(15)

No. 95-259-CFX Title: Darlene Walters, Petitioner
v.
Metropolitan Educational Enterprises, Inc. and Leonard Bieber

Docketed:
August 14, 1995 Court: United States Court of Appeals for the Seventh Circuit

Vide:
95-779

Entry	Date	Proceedings and Orders
	Aug 14 1995	Petition for writ of certiorari filed.
	Aug 25 1995	Supplemental brief of petitioner filed.
	Sep 25 1995	Waiver of right of respondents Metropolitian Educational Enterprises, Inc., et al. to respond filed.
	Dec 27 1995	DISTRIBUTED. January 12, 1996
	Jan 9 1996	Response requested.
	Jan 18 1996	Order granting extension of time to file consolidated response to petitions (95-779) to and including February 16, 1996.
	Feb 16 1996	Brief of respondents Metropolitian Educational Enterprises, Inc., et al. in opposition filed. VIDED.
	Feb 28 1996	REDISTRIBUTED. March 15, 1996
	Mar 18 1996	Petition GRANTED. SET FOR ARGUMENT November 6, 1996. **********
	Apr 19 1996	Order extending time to file brief of petitioner on the merits until May 20, 1996.
	May 10 1996	Order further extending time to file brief of petitioner on the merits until May 29, 1996.
	May 28 1996	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed. VIDED.
	May 29 1996	Brief amicus curiae of AFL-CIO filed. VIDED.
	May 29 1996	Joint appendix filed. VIDED.
	May 29 1996	Brief of petitioner Darlene Walters filed. VIDED.
	May 29 1996	Brief amici curiae of Women's Legal Defense Fund, et al. filed. VIDED.
	May 29 1996	Brief of petitioner Equal Employment Opportunity Commission filed. VIDED.
	Jun 26 1996	Order extending time to file brief of respondent on the merits until August 5, 1996.
	Aug 2 1996	Brief amici curiae of Pacific Legal Foundation, et al. filed. VIDED.
	Aug 5 1996	Brief amici curiae of Illinois State Chamber of Commerce, et al. filed. VIDED.
	Aug 5 1996	Brief of respondents Metropolitian Educational Enterprises & Leonard D. Bieber filed. VIDED.
	Aug 14 1996	Record filed.
	Aug 20 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 6 1996	Reply brief of petitioner Darlene Walters filed. VIDED.
	Sep 9 1996	Reply brief of petitioner Equal Employment Opportunity Commission filed. VIDED.

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No. 95-259-CFX

Entry	Date	Proceedings and Orders
	Sep 13 1996	CIRCULATED.
	Sep 20 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 6 1996	ARGUED.
	Nov 6 1996	Letter from the Solicitor General received and distributed.
	Nov 7 1996	Record filed.

Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DARLENE WALTERS,
PETITIONER,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC.
AND LEONARD BIEBER.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1988 & Supp. V. 1993), applies only to an "employer," defined in Section 701(b), 42 U.S.C. § 2000e(b) (1988), to be "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."

The question presented is:

Whether that jurisdictional definition is satisfied when an employer maintains fifteen or more employees on the payroll for the requisite number of weeks even though fewer than fifteen employees report to work or are on paid leave on each day of each such week, as to which the courts of appeals are in direct conflict.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DARLENE WALTERS,
PETITIONER,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC.
AND LEONARD BIEBER.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Darlene Walters respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is as yet unreported in the Federal Reporter, but is

reported at 1995 WL 422839. The opinion and order of the district court (App., *infra*, 13a-19a) are reported at 864 F. Supp. 71.

JURISDICTION

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) (1988), and under 28 U.S.C. § 1331 (1988). The judgment of the court of appeals was entered on July 18, 1995, affirming the judgment of the district court that dismissed petitioner's suit for lack of subject matter jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

This case involves the construction of Section 701(b) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, Title VII, § 701(b), 78 Stat. 241, 253 (1964), as amended by Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 104-05 (1972), 42 U.S.C. § 2000e(b) (1988), reproduced in the Appendix, *infra*, 20a, which provides, in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .

Also reproduced in the Appendix are relevant provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1988 & Supp. V 1993) (App., *infra*, 24a-26a), and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (Supp. V 1993) (App., *infra*., 26a-29a).

STATEMENT OF THE CASE

1. Respondent Metropolitan Educational Enterprises, Inc. (Metropolitan) sells encyclopedias, dictionaries and educational materials throughout the United States and arranges financing for its customers. Respondent Leonard Bieber is the company's president and sole shareholder. R. 37, 40.

Petitioner Darlene Walters was employed by Metropolitan as a collector. In April, 1990, after being denied a promotion to credit manager, she filed a charge of gender discrimination with the Equal Employment Opportunity Commission (EEOC). Metropolitan then terminated her employment. She then filed an EEOC charge for retaliation. App., *infra*, 14a.

In April, 1993, three years after Ms. Walters' discharge, the EEOC filed suit against respondents alleging that the discharge was illegal retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3(a) (1988). App., *infra*, 14a. Ms. Walters intervened as a matter of right under 42 U.S.C. § 2000e-5(f)(1) (1988), asserting that respondents had illegally

denied her the promotion because of her gender and then had illegally fired her in retaliation for her filing the EEOC charge. *Id.* at 14a; R. 9-11.

2. Metropolitan moved to dismiss for lack of subject matter jurisdiction, claiming under the rule of *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983), that it was not an "employer" under Title VII because it had fewer than the minimum jurisdictional number of employees. App., *infra*, 14a, 16a. In *Zimmerman*, which involved the nearly identical jurisdictional provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 630(b) (1982) (*Id.* at 24a), the Seventh Circuit held that hourly employees are considered employees under the ADEA only on days they were either physically present at work or on paid leave. *Id.* at 16a.

Ms. Walters and the EEOC urged the district court to reject *Zimmerman* and to count instead the number of employees on Metropolitan's weekly payroll, arguing that this "payroll" method was supported by Title VII's legislative history, by judicial authority from other circuits, and by the EEOC's own administrative construction of the jurisdictional statute. Ms. Walters and the EEOC also argued that in 1993 Congress had endorsed the payroll method in enacting almost identical language into the Family and Medical Leave Act of 1993 (FMLA), Pub. L. No. 103-3, § 101(4)(A), 107 Stat. 6, 8 (1993), codified at 29 U.S.C. § 2611(4) (Supp. V 1993), (App., *infra*, 28a); S. Rep. 103-3, 103d Cong., 1st Sess. 21-22 (1993) *reprinted*

in 1993 U.S.C.C.A.N. (107 Stat.) 23-24.

Discovery focused on that jurisdictional question — *i.e.*, the number of employees working for Metropolitan during 1989 and 1990. For the next eight months, the parties examined at great length two years of Metropolitan's payroll registers, time cards, work diaries, and other timekeeping records. R. 37. The parties compiled the information gleaned from that discovery into detailed summaries of the days and weeks worked by each Metropolitan employee and then submitted the issue to the district court on a stipulated record. *Id.*

The parties stipulated that respondent Bieber was Metropolitan's only salaried employee and that there were two regular part-time employees and between eleven and fifteen full-time hourly employees. The parties stipulated that Metropolitan had fifteen or more employees on its payroll for forty-seven weeks in 1990, but that fifteen or more employees had been physically present at work or on paid leave on each working day of only nine of those weeks. App., *infra*, 15a; R. 37. These facts meant that Metropolitan did not meet the jurisdictional minimum under the *Zimmerman* day-by-day method, but would meet the jurisdictional minimum under the payroll method advocated by Ms. Walters and the EEOC. The district court's jurisdiction thus turned on the method of counting Metropolitan's part-time and regular full-time hourly employees.

The parties also stipulated that Metropolitan did not

have fifteen or more employees in 1989, the year preceding Ms. Walters' termination. App., *infra*, 15a; R. 37. Other stipulations between Ms. Walters and respondents established that Metropolitan was indeed a company engaged in an industry affecting commerce in that it had a large number of independent sales representatives (stipulated by the parties not to be Title VII employees) who sold Metropolitan's product lines by door to door solicitation throughout the country and who arranged for installment financing of those sales. (R. 40).

The district court granted Metropolitan's motion to dismiss on the basis of *Zimmerman* and the stipulated facts. App., *infra*, 18a-19a. The court reasoned that *Zimmerman*, an ADEA case, controlled this, a Title VII case, because of the common purpose of Title VII and the ADEA and their virtually identical definitions of "employer." *Id.* Therefore, the court declined to adopt the payroll method of counting employees for the reason that it could not "modify Seventh Circuit precedent." *Id.* at 17a.

3. A panel of the court of appeals affirmed, holding that the arguments of Ms. Walters and the EEOC were not sufficiently compelling to overcome the stare decisis effect of *Zimmerman*. App. at 5a-6a, 11a. Thus, the court held that hourly and part-time workers are to be counted as Title VII employees only on the days they are "physically present at work or are on paid leave." *Id.* at 3a-4a, 6a.

Although *Zimmerman* had been an ADEA case, the

court of appeals concluded that it controlled this Title VII case because of the "mirror similarity" between the two jurisdictional statutes. App., *infra*, 4a, n.2.

Although "agreeing that the statute could have been worded more clearly," the court of appeals reaffirmed *Zimmerman's* reading of the "plain text" of the statute. App., *infra*, 6a. The court of appeals reaffirmed *Zimmerman's* conclusion that the day-by-day method was the only construction of the statute that gave meaning to the statutory phrase "for each working day." The court rejected as "unlikely" the construction of that phrase that would more appropriately cover employees who enter or leave employment mid-week. *Id.* at 6a.

While agreeing that the legislative history supported the payroll method of counting, the court of appeals reiterated *Zimmerman's* conclusion that the legislative history of Title VII was "too confused and chaotic to be of much use." App., *infra*, 5a, n.3.

While noting that Congress had endorsed the payroll method in 1993 when enacting a nearly identical jurisdictional provision in the FMLA, the court held that this legislative history by a later Congress enacting a different statute was of no force and did not resolve the judicial conflict. App., *infra*, 7a-9a.

While noting the several contrary decisions by other circuits and district courts, the court of appeals noted the number of decisions following *Zimmerman*, and concluded

that the relatively even split of authority "hardly presents a pressing reason to overturn settled precedent." App., *infra*, 10a.

While recognizing that the EEOC had formally adopted the payroll method in its administrative compliance procedures, the court of appeals declined to follow the EEOC policy because it had been adopted after *Zimmerman* and because the court, not an administrative agency, was "the final arbiter of statutory construction." App., *infra*, 10a.

Finally, the court of appeals rejected public policy concerns regarding the potential under the day-to-day test for an employer's evasion of Title VII and the ADEA, and discounted the burden on district courts under that test of counting every employee for every work day for a two year period. App., *infra*, 11a.

Judge Ripple concurred in the panel's decision. He stated, however, that "the correctness of *Zimmerman* . . . is not free from doubt . . . ." App., *infra*, 11a. He acknowledged the "thoughtful divergence of opinion" from the other circuits, but he "reluctantly" concluded that those cases do not "cast such a shadow on *Zimmerman* as to justify its overruling." Judge Ripple noted that this issue deserved "definitive legislative attention" and concluded by emphasizing that

> The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago. *Id.* at 12a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that in determining jurisdiction under Title VII, hourly and part-time employees are only counted on the days they report to work or are on paid leave.

That ruling directly conflicts with decisions of two other circuits and of numerous district courts, creating a lack of uniformity in the jurisdiction of the federal courts in both Title VII and ADEA cases. The ruling also conflicts with the EEOC's adoption and application of the payroll method in determining its own jurisdiction in administrative investigations, thus clouding that process. The ruling also imposes an unnecessary burden on the district courts and fails to recognize the realities of the changing American work place. The ruling is not in accord with the text of the statute and its legislative history. Finally, the ruling injects a substantial irrational disharmony into the interpretation of closely related statutory schemes which contain virtually identical provisions. Review by this Court is therefore warranted.

1. a. As the Seventh Circuit's decision in this case acknowledges, the circuits are split on the question of counting employees for jurisdictional purposes under Title VII and the ADEA. App., *infra*, 8a-9a. The Seventh Circuit's decisions in this case and in *Zimmerman* conflict

with decisions from the First and Fifth Circuits. *Vera-Lozano v. International Broadcasting*, 50 F.3d 67, 69-70 (1st Cir. 1995) (Title VII); *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-35 (1st Cir. 1983) (Title VII), cert. denied, 466 U.S. 904 (1984); *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n. 7 (5th Cir. 1980) (Title VII).

This conflict also includes the Eighth Circuit which has followed the *Zimmerman* approach. *McGraw v. Warren County Oil Co.*, 707 F.2d 990 (8th Cir. 1983) and *EEOC v. Garden and Assocs., Ltd.*, 956 F.2d 842 (8th Cir. 1992).

When the Seventh Circuit first visited this issue in 1983 in *Zimmerman*, it concluded that there was little legislative history or case law interpreting the ADEA, the statute involved in that case, and Title VII, the statute from which the ADEA jurisdictional provision was borrowed. *Zimmerman* concluded that the phrase "for each working day" would be rendered meaningless unless it was construed to mean that hourly employees are considered employees only on days when they were either physically present at work or on paid leave. 704 F.3d at 353-54.

In this case, however, the Seventh Circuit acknowledged that "the statute could have been worded more clearly" (App., *infra*, 6a), and that the legislative history does support the payroll method advocated by petitioner. *Id.* at 5a, n.3. Nevertheless, the court reaffirmed *Zimmerman's* interpretation of the "plain language of the statute." *Id.* at 6a.

In contrast, in 1983, the First Circuit rejected the day-by-day method and held that the jurisdictional number is determined by counting the employees on the payroll regardless of whether they report to work each work day of a work week. *Thurber*, 717 F.2d at 634-35. Furthermore, the First Circuit reached exactly the opposite conclusion from the Seventh Circuit with respect to Title VII's legislative history, determining that the legislative history "weighs heavily against" a day-by-day approach. *Id.* at 634.

That twelve year old conflict between *Zimmerman* and *Thurber* persists. Four months before the Seventh Circuit decided this case, the First Circuit reaffirmed *Thurber's* interpretation of both the statute and the legislative history and approved again the payroll counting method. *Vera-Lozano*, 50 F.3d at 69-70.

This conflict of result and rationale between the circuits is unlikely to abate. The two strands of case law are irreconcilable.

b. In addition, there is a growing number of conflicting federal district court decisions.

Several district courts have adopted the payroll method advocated by petitioner but rejected by the Seventh Circuit. *Edwards v. Esau Investments, Inc.*, 66 Fair Empl. Prac. Cas. (BNA) 711 (D. Kan. 1994) (Title VII); *Shepherdson v. Local Union No. 401*, 823 F. Supp. 1245, 1251-52 (E.D. Pa. 1993) (Title VII); *Reith v. Swenson*, 63

Fair Empl. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993) (Title VII); *Cohen v. S.U.P.A. Inc.*, 814 F. Supp. 251, 254-56 (N.D.N.Y. 1993) (ADEA); *Vano v. Au*, 1992 WL 175498 at *2 (W.D. Va. 1992); *Simmons v. Vliets Farmers Coop.*, 55 Fair Empl. Prac. Cas. (BNA) 1341, 1342 (D. Kan. 1991); *Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) (ADEA); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553, 1554 (M.D.N.C. 1984) (Title VII), *aff'd*, 769 F.2d 1012, 1014 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983) (Title VII); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980) (Title VII); *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979) (Title VII); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1327 (D. Minn. 1975) (Title VII), *aff'd*, 566 F.2d 1178 (8th Cir. 1977).

In contrast, other district courts have adopted the Seventh Circuit's day-by-day approach. See, *e.g.*, *Richardson v. Bedford Place Housing Phase I Assocs.*, 855 F. Supp. 366 (N.D. Ga. 1994) (Title VII); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) (ADEA and Title VII); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Me. 1992) (ADEA); *Norman v. Levy*, 756 F. Supp. 1060, 1063-64 (N.D. Ill. 1990), *supplemental opinion* 767 F. Supp. 1441 (N.D. Ill. 1991) (Title VII); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-09 (S.D. Ohio 1989) (ADEA); *Schoenbaum v. Orange County Center for the Performing*

Arts, Inc., 677 F. Supp. 1036, 1039 (C.D.Cal. 1987) (ADEA).

Even in some district court decisions following the Seventh Circuit's day-by-day counting method, doctrinal confusion is evident. *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. at 34-35, an ADEA case, applied the day-by-day approach, ignoring without mention the First Circuit's contrary ruling under Title VII in *Thurber*. The district court in *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. at 1332, was bound to follow *Zimmerman*, but soundly criticized it and strongly urged its reconsideration. This confusion is apt to continue, as is the conflict among the district courts.

2. The conflict is not limited to the courts, but reaches as well to the EEOC's national administrative and investigative responsibilities.

As part of its own internal compliance policy-making administrative and investigative processes, the EEOC has explicitly rejected the day-by-day counting method and instead has formally adopted the payroll method in determining its own jurisdiction under both Title VII and the ADEA. EEOC Policy Guidance, Notice No. N-915-052, EEOC Compliance Manual, Vol. II, II EEOC Comp. Man. (BNA), 8 FEP Man. 405:6857 (April 20, 1990), reproduced in the Appendix, *infra*, 30a-40a.

The deluge of claims cascading into the EEOC is no secret. Nor is the EEOC's backlog of cases and delay in

processing claims. EEOC Office of Program Operations, Enforcement Statistics, FY 1984-FY 1994 (February 1995). Under the state of the law now, the EEOC must apply different jurisdictional tests in different parts of the country. As a result, the EEOC's jurisdictional determination standards and procedures have necessarily been thrown into turmoil, resulting in the balkanization of its investigative process.

Moreover, the obvious burden on the EEOC to count jurisdictional employees for every work day of a two year period poses a serious concern about the ability of that overburdened, underfunded agency to fulfill its statutory duties. In turn, any degradation of those duties will effect the continued legitimacy of the agency with the citizens it serves — both claimants and respondents.

The seriousness of this burden on the EEOC also spills into the district courts' adjudication of Title VII and ADEA cases. Although the Seventh Circuit dismissed petitioner's arguments about the burden on the district courts and litigants arising from the *Zimmerman* requirement of counting employees on every work day of a two year period, the fact remains that the payroll method advocated by petitioner is a much easier one to apply: all one need do is examine straightforward payroll documents. Given the extraordinary workload of our district courts, especially in metropolitan areas like Chicago, Boston and New Orleans, the concern about the time-consuming and cumbersome day-by-day counting method is a real one deserving of more in-depth consideration.

These concerns are not merely theoretical but touch this case. The EEOC investigation in this case took three years, and the jurisdictional determination by the district court another year and a half, all in a case involving a stipulated factual record.

Thus, for these reasons of judicial and regulatory administration, this jurisdictional issue is of sufficient practical importance to justify review by this Court.

3. The Seventh Circuit's reading of the legislative history also seems misplaced.

While the route of Title VII as a whole through Congress was complicated due to the controversy over civil rights legislation in the climate of 1963 and 1964, the form of the jurisdictional minimum of employees remained constant from the first day Senate Majority Leader Mansfield and Minority Leader Dirksen introduced their compromise version of Title VII until its enactment into law. *Compare* Amendment No. 1052 in the Nature of a Substitute, 110 Cong. Rec. 13310, 13314 (1964), *with* text of Title VII as enacted, Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 241, 253 (1964).

As a co-sponsor of that compromise, Senator Dirksen clearly described the source and purpose of the jurisdictional minimum contained in his proposed Title VII. 110 Cong. Rec. 13087 (1964). As he explained, the concept of a jurisdictional minimum was based on a similar provision of the Unemployment Compensation Act

(UCA). *Id.*; *see*, Social Security Act of 1935, Pub. L. 74-271,Title IX, § 907(a), 49 Stat. 620, 642 (1935), *reenacted and codifed by* Internal Revenue Code of 1939, Pub. L. 76-1, ch. 9, § 1607(a), 53 Stat. 1, 187 (1939), 26 U.S.C. § 1607(a) (1940) (currently codified as further amended at 26 U.S.C. § 3306(a) (1988)). At the time of the enactment of Title VII, that provision of the UCA had long been construed to include all employees on the payroll without regard to their presence at work on each work day. Rev. Rul. 55-19, 1955-1 C.B. 496.

This clarity in the legislative history moved the First Circuit to twice reject the day-by-day approach. *Thurber*, 717 F.2d at 634-35; *Vera-Lozano*, 50 F.3d at 70.

This clarity in the legislative history in turn raises substantial questions about the Seventh Circuit's conclusion that the legislative history was "confused and chaotic." App., *infra*, 5a, n.3.

4. The central rationale of the Seventh Circuit in *Zimmerman* and this case was that the day-by-day method is the only construction that would give meaning to the statutory phrase "for each working day." Under the payroll method, the court concluded, that phrase would be rendered meaningless. *Zimmerman*, 704 F.2d at 353-54.

In fact, that reading of "for each working day" is not the only one that gives effect to the whole of the statute. For example, in *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. at 1331-32, the district court proposed that

the statutory phrase "for each working day" has meaning under the payroll method because, by using the phrase "employer . . . who *has* fifteen or more employees for each working day . . ." (emphasis added), the statute focuses on the employment relationship rather than the employee's presence at work on each such day.

Thus, the court of appeals was incorrect in concluding that the "day-to-day" construction was the only one that gave meaning to the statute.

5. Furthermore, the court of appeals' reading of the statute is at odds with the changing realities of the American work place.

Petitioner suggested to the court of appeals that the phrase "for each working day" has meaning under the payroll method because it accounts for employees who enter or leave employment in mid-week. The court of appeals' rejection of this scenario as "unlikely" (App., *infra*, 6a) is unpersuasive as a matter of principle and is contrary to the facts of this case in which such mid-week employment changes occurred *nine* times and included the *mid-week* illegal termination of Ms. Walters. R. 37.

Furthermore, the payroll method, but not the day-to-day test, takes into account employers whose payroll periods begin and end in mid-week and whose employees start or end their employment at the beginning or end of such a payroll period.

The day-to-day test also does not account for the increasing phenomenom of "flextime" whereby, for example, employees work ten hours on four days a week rather than eight hours on five days. Under the day-to-day test, such workers are not considered as Title VII employees even though they work the same forty hours as the "nine-to-fiver" who works Monday to Friday. That work pattern was also present in this case but was ignored by the court of appeals.

The court of appeals' analysis does not account for the ever increasing labor phenomenon of part-time employment. Under the court's reading of the statute, an employer could have far more than fifteen part-time employees on its payroll, but only fourteen employees at work on one day of each work week. Such an employer would not be covered by Title VII or the ADEA.

And what of the burgeoning practice of "telecommuting"—employees who work from their homes maintaining contact with the office by telephone and computer? Or what of employers with a sales force of commissioned salespersons who work from their homes and who are paid only when they consummate a sale? It would necessarily be difficult to determine when if ever such salespersons are "at work" or when they are paid, such as, for example, during a "dry spell" when they are on the road, but making no sales and generating no commissions. The anomaly of the court of appeals' ruling is that such salespersons would not be counted as Title VII and ADEA employees.

Thus, the court of appeals' analysis is substantially at odds with the practical realities of commonplace employer/employee payroll and employment practices.

Moreover, the day-to-day method creates an unwarranted class-based distinction between, on the one hand, salaried employees more likely to be professionals, and, on the other hand, hourly and part-time workers, more likely to be women and minorities. What sense does it make to treat the intended beneficiaries of Title VII as jurisdictional employees only on the days they work, but to count professional salaried employees on all work days whether or not present at work?

These concerns are especially significant in this, a Title VII case, because of the ever increasing number of women who are entering the American workforce, some for personal fulfillment, but most because of the financial necessities of our times: in the traditional two parent home, two wage earners are required to maintain the desired living standard. In this era of divorce and family dissolution, the pressure to work on a woman heading a single parent home is much more dire. And what of single women who enter the workforce to support themselves? It is simply unwise judicial policy to exempt such women from the coverage of Title VII because they might work part-time or on flexible schedules rather than nine-to-five, Monday to Friday.

6. The definition of "employer" in Title VII and in the ADEA is virtually identical to that of the recently

passed Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4) (Supp. V 1993). App., *infra*, 28a. All three include the "for each working day" language which convinced the Seventh Circuit to apply the day-by-day method. In enacting the FMLA, however, Congress explicitly indicated that this language means employ in the sense of maintain on the payroll, just as "most courts and the EEOC have interpreted" it, and not in the sense of physical presence at work. S. Rep. 103-3, 103d Cong., 1st Sess. 21-22 (1993) *reprinted in* 1993 U.S.C.C.A.N. (107 Stat.) 23-24. App. *infra*, 7a.

It is apparent, therefore, that the jurisdictional language of the FMLA will be construed under the payroll method. *Cf. Astrowsky v. Fort Portland Mortgage Corp.*, 1995 WL 349000 (D.Me. 1995) (noting close similarity of jurisdictional provisions of Title VII, the ADEA and the FMLA). However, under the Seventh Circuit's decision in this case, virtually identical statutory language in the closely related statutory schemes of Title VII and the ADEA will be construed under the opposite day-to-day method. This disharmony is obviously irrational and should be eschewed.

The Seventh Circuit lost the opportunity to harmonize and settle the construction of these important closely related statutory schemes. This case gives this Court the opportunity to accomplish that important purpose.

7. In terms of judicial craftsmanship, this case is an appropriate vehicle for review. The record is streamlined

and is based on simple straightforward stipulations that starkly frame the jurisdictional issue. The issue presented is solely a question of law to be reviewed *de novo* by this Court.

8. The actual practical effect of the circuit split is that the jurisdiction of a federal district court, in both Title VII and ADEA cases, depends on its location. Further, the EEOC's administrative and investigative jurisdiction is substantially clouded by this conflict. The rule approved by the court of appeals imposes an undue and unnecessary burden on the district courts. The rule does not properly account for the changing realities of the American work place. The rule is not in accord with the statute's text and its legislative history. The rule injects irrational disharmony into the interpretation of closely related statutory schemes.

In sum, a uniform rule is needed. As Judge Ripple stated: "[t]he scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST, 1995

APPENDIX A

United States Court of Appeals
For the Seventh Circuit

Nos. 94-3334 and 94-3592

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

AND

DARLENE WALTERS,
Intervening Plaintiff-Appellant,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INCORPORATED, AND LEONARD BIEBER,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 2099—**James B. Moran**, *Chief Judge.*

Argued April 7, 1995—Decided July 18, 1995

Before CUMMINGS, EASTERBROOK and RIPPLE, *Circuit Judges.*

CUMMINGS, *Circuit Judge*. This case presents the question whether, by virtue of recent legislative developments or a closer look at old ones, this Court should overrule its decision in *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983). In that case, we defined "employer" in the context of the Age Discrimination in Employment Act ("ADEA"), a construction since extended to other anti-discrimination legislation including Title VII. The Equal Employment Opportunity Commission ("EEOC") urges us to adopt a more expansive definition. Intervening plaintiff Darlene Walters joins in this plea for the simple reason that our *Zimmerman* definition forecloses her Title VII retaliatory discharge claim against the defendants, her former employer and the company's president. We are not persuaded that subsequent events dictate overruling *Zimmerman*, however, and therefore reject the EEOC's and Walters' invitation to do so.

BACKGROUND

The EEOC sued Metropolitan under § 704(a) of Title VII (42 U.S.C. § 2000e-3(a)) in 1993, alleging that Metropolitan had fired Walters three years earlier in retaliation for her filing of a gender discrimination charge. Walters subsequently intervened as plaintiff. Metropolitan moved to dismiss the suit for lack of subject matter jurisdiction, alleging that the company was not an "employer" under Title VII, and the parties proceeded to discovery on that question. In August 1994, after analyzing the parties' stipulations regarding Metropolitan's

payroll records, the district court granted defendants' motion to dismiss on the ground that Metropolitan did not qualify as an employer under Title VII and there was accordingly no federal jurisdiction.[1] 864 F. Supp. 71, 73 (N.D. Ill. 1994).

Under Title VII, an employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). The statute does not explicitly prescribe a method of counting employees to verify whether the requisite minimum of 15 is reached, but two have emerged from case law. One, endorsed by the EEOC and adopted by a number of courts, is the "payroll method." It looks at the number of employees maintained on an employer's payroll within a given week: if this number is at least 15 for at least 20 calendar weeks the jurisdictional minimum is satisfied, regardless of whether or not every employee on the payroll shows up for work every day of the calendar week.

The alternative method counts all salaried employees toward the minimum, but takes a different approach toward hourly or part-time workers. Such workers are considered employees only on days when they are physically present at work or are on paid leave. The jurisdictional minimum of employees must be at the

[1] Walters brought pendent state claims in addition to her Title VII claim, which the district court also dismissed.

workplace or on paid leave for each day of the work week, or the week will not be counted.

In *Zimmerman*, the Seventh Circuit endorsed this counting system and rejected the payroll approach.[2] The panel in that case examined the statutory language of the ADEA and focused on its provision (like Title VII's) that an employer must have the requisite number of employees "for each working day of a week before that week can be counted toward the jurisdictional minimum." *Id.* at 353-354. Seeing no way to reconcile the phrase "for each working day" with the payroll method, the panel held that the correct method excluded hourly paid workers on days when they were neither working nor on paid leave. *Id.* To conclude otherwise, the *Zimmerman* panel held, would

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[2] *Zimmerman*, as we have stated, involved a claim brought under the ADEA rather than one brought pursuant to Title VII. The district court, however, properly found *Zimmerman* dispositive. Because Title VII and the ADEA have a common purpose, we have relied upon cases interpreting a definition in one statute as persuasive when construing a similar definition in the other. *Hayden v. La-Z-Boy Chair Co.*, 9 F.3d 617, 619 (7th Cir. 1993), certiorari denied, 114 S. Ct. 1371.

The ADEA's definition of employer is "essentially identical to Title VII's," and "[c]ourts routinely apply arguments" to the two interchangeably. *EEOC v. AIC Security Investigations, Ltd.*, Nos. 93-3839, 94-1018, 94-2895 and 94-3089, 1995 U.S. App. LEXIS 12139, at *5 and n.1 (7th Cir. May 22, 1995); see also *Zimmerman*, 704 F.2d at 352 (ADEA provision is "nearly identical to the definition of employer in Title VII."). While Walters argues that we may view this case unfettered by *Zimmerman*, therefore, the mirror similarity between the definition of employer in the two contexts and their common purpose counsels—indeed requires—deference to our precedent.

render the words "for each working day" superfluous and would be contrary to the "explicit definitional restriction chosen by Congress." *Id.*[3] The panel also noted that had Congress wanted to define the jurisdictional minimum in terms of the number of employees on the payroll each week, it could certainly have done so. *Id.*

ANALYSIS

The EEOC and Walters aim a fusillade of arguments at *Zimmerman*. Primarily they contend that in enacting the Family and Medical Leave Act ("FMLA"), Congress endorsed the payroll method over the *Zimmerman* alternative in a manner that counsels deference from this Court. They also point to other case law and the EEOC's own guidelines which are contrary to the holding in *Zimmerman*. Finally, they submit that the payroll approach comports better with public policy considerations.

In considering these arguments, we bear in mind that

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[3] The *Zimmerman* panel also concluded that the legislative history of Title VII, on which the relevant provisions of the ADEA are based, offered little interpretive assistance. 704 F.2d at 352-353. Plaintiffs contend that in fact, the legislative history of Title VII supports their reading, and base this argument on remarks of Senator Dirksen which suggest that Title VII's definition of employer was borrowed from the Unemployment Compensation Act. Although certain remarks of Senator Dirksen are consistent with plaintiffs' argument, we agree with the *Zimmerman* court that the legislative history of Title VII is too confused and chaotic to be of much use. See also *EEOC v. Missouri Pac. R. Co.*, 493 F.2d 71, 74 (8th Cir. 1974).

compelling reasons are required to overturn Circuit precedent. "*Stare decisis* is of fundamental importance to the rule of law," *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202, and has even greater force when the precedent in question involves a statutory construction. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172.

We also note that this Court based *Zimmerman* on a reading of the statute's plain text that we continue to endorse. As the *Zimmerman* panel noted, the phrase "for each working day" must be given some meaning within the context of the statute, and the most natural interpretation of that phrase looks to the number of employees physically at work on each day of the week. Plaintiffs suggest an alternative interpretation that looks to situations when an employee joins or exits the payroll mid-week; this seems a highly unlikely reading of the statute, particularly since instances where employees begin work on Wednesdays or depart on Thursdays are unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute.

While agreeing that the statute could have been worded more clearly, we believe that the *Zimmerman* court's interpretation of its plain text has stood the test of time and a new set of appellate eyes. Generally, a judicial construction of the plain language of the statute ends the matter conclusively: the law is clear that when a court can glean the meaning of a statute from its text, it should look no further. *United States v. Hudspeth*, 42 F.3d 1015, 1022

(7th Cir. 1994), *certiorari denied*, __ S. Ct. __, 1995 WL 105514 (May 30, 1995).

Notwithstanding this fact, plaintiffs contend that the recent passage of the FMLA, with a definition of "employer" that closely tracks those in the ADEA and in Title VII, is reason enough for us to re-examine *Zimmerman's* holding.[4] The Senate Report for the FMLA endorses the payroll approach to identifying employers:

> The quoted language parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted this language, "employs * * * employees for each working day" is intended to mean "employ" in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be considered for this purpose.

S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993). Such congressional commentary, unfortunately for plaintiffs, has little effect on our view of Title VII. First, the Congress that passed the FMLA has no special sanction to interpret the actions of a previous Congress. "The interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Pub. Employees*

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[4] The FMLA defines an employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(I).

Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 168.

Second, although plaintiffs designate the adoption of the FMLA as a "significant development of the law on the proper interpretation of the statutory definition of 'employer' contained in Title VII," Pl. Br. at 13, this purported legal milestone occurred not within the text of the statute, but within legislative history, which has no force of law. As the District of Columbia Circuit recently observed, "A congressional report, even a conference report, is not legislation ... and it does not change the law." *In re North*, 50 F.3d 42, 46 (D.C. Cir. 1995); see also *Davel v. Sullivan*, 902 F.2d 559, 562 (7th Cir. 1990) ("The words of the statute, not the words of the legislative history, control statutory interpretation").

The Supreme Court has explicitly rejected the notion that judicial interpretation of a statute owes deference to language in a legislative report. In *Pierce v. Underwood*, the Court held that where there was an "almost uniform appellate interpretation" of legislation, re-enactment of the same statutory language would be presumed to re-enact that "settled judicial interpretation" regardless of a legislative report to the contrary. 487 U.S. 552, 567. While further action taken by Congress can justify the abandonment of statutory precedent, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, legislative history is not akin to legislative action. See *Pierce*, 487 U.S. at 567-568.

In this case, as plaintiffs point out, there is an existing

Circuit split, not a settled judicial interpretation, regarding the correct means of determining who is an employer. Still, we note that had Congress truly intended to enact the payroll method into law, it certainly could have done so in clear and unambiguous terms. *Cf. Pierce*, 487 U.S. at 568 (where legislative report is out of accord with prior usage, "the clearest indication of congressional command" will be required). Instead, knowing (because *Zimmerman* and other like cases so instructed it) that Title VII's and the ADEA's "for each working day" language was problematic, Congress chose not to respond to these concerns in enacting the FMLA. If indeed Congress wished to resolve the Circuit conflict in a particular direction, this was "a strange way to make a change." *In re North*, 50 F.3d at 46, quoting *Pierce*, 487 U.S. at 567.

Plaintiffs also argue that judicial and regulatory authority from other Circuits and from the EEOC support overruling *Zimmerman*. Among our sister Circuits, the First and Fifth have adopted the payroll method, as have a number of district courts;[5] the Eighth Circuit and several

[5] See, *e.g.*, *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-635 (1st Cir. 1983), certiorari denied, 466 U.S. 904; *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980); *Reith v. Swenson*, 63 Fair Empl. Prac. Cas. 885, 897 (D. Kan. 1993); *Cohen v. S.U.P.A. Inc.*, 814 F. Supp. 251, 254-256 (N.D.N.Y. 1993); *Vano v. Au*, 1992 WL 175498 at *2 (W.D. Va. 1992); *Gorman v. North Pittsburgh Oral Surgery Assocs. Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. 1553, 1554 (M.D.N.C. 1984), *affirmed*, 769 F.2d 1012 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980); (continued...)

other district courts have adopted the *Zimmerman* approach.[6] The EEOC's Statement of Policy Guidance explicitly rejects the *Zimmerman* approach and endorses the payroll method. EEOC Policy Guidance, EEOC Compliance Manual, Vol. II, Notice No. N-915-052 (April 20, 1990).

Regarding the Circuit split, it is enough to note the large number of recent cases on both sides of the issue; that some courts have disagreed with our analysis while others have adopted it hardly presents a pressing reason to overturn settled precedent. The EEOC's Compliance Manual, on the other hand, was promulgated well after our decision in *Zimmerman*. While we afford deference to legitimate agency interpretations of statutory language made before we have ruled on an issue, the converse is not true: the judiciary, not administrative agencies, is the final arbiter of statutory construction. See *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843

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[5](...continued)
Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936, 941 (D. Colo. 1979).

[6] See, *e.g.*, *EEOC v. Garden and Associates, Ltd.*, 956 F.2d 842 (8th Cir. 1992); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983); *Richardson v. Bedford Place House Phase I Associates*, 855 F. Supp. 366 (N.D. Ga. 1994); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Maine 1992); *Norman v. Levy*, 756 F. Supp. 1060, 1063-1064 (N.D. Ill. 1990); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-709 (S.D. Ohio 1989), amended in part on other grounds, 58 Fair Empl. Prac. Cas. 842; *Schoenbaum v. Orange County Center for the Performing Arts, Inc.*, 677 F. Supp. 1036, 1039 (C.D. Cal. 1987).

n.9.

Finally, plaintiffs urge us to consider potential policy problems inherent in our retention of the *Zimmerman* standard in the face of a conflicting interpretation regarding the FMLA. We have not yet been asked to interpret the FMLA and decline to create a conflict where none yet exists. Plaintiffs also present a parade of horribles that could result from continued application of *Zimmerman*, most notably an employer's ability to evade the strictures of anti-discrimination legislation simply by structuring operations to avoid having the jurisdictional minimum present on each working day. Yet in more than a decade since this Court ruled in *Zimmerman*, this parade has had conspicuously few participants. Finally, plaintiffs argue that the payroll method is simpler to implement; this rationale, however, simply is not sufficient to override settled statutory interpretation.

CONCLUSION

Failing to see a compelling reason for overturning our Circuit precedent in *Zimmerman*, we affirm the judgment of the district court dismissing plaintiffs' suit for lack of jurisdiction.

RIPPLE, *Circuit Judge*, concurring. I join the judgment of the court. Although the correctness of *Zimmerman v. North American Signal Company*, 704 F.2d 347 (7th Cir. 1983), is not free from doubt, I must conclude, with some reluctance, that the EEOC has not made a sufficiently

strong case to warrant our overruling established precedent of long standing. As the majority notes, our obligation to adhere to the doctrines of stare decisis and precedent is especially strong when we are dealing with matters of statutory construction. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). That obligation is tempered somewhat by our obligation to reassess our work when a thoughtful divergence of opinion emerges from the other circuits. Upon examination of the case law to the contrary, however, I cannot say that those cases cast such a shadow on *Zimmerman* as to justify its overruling. This issue is one, however, that deserves definitive legislative attention. The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago.

APPENDIX B

United States District Court,
Northern District of Illinois,
Eastern Division

No. 93 C 2099

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

AND

DARLENE WALTERS,

Plaintiff-Intervenor,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INCORPORATED, AND LEONARD BIEBER,

Defendants.

August 30, 1994

MEMORANDUM AND ORDER

MORAN, *Chief Judge.* Plaintiff United States Equal

Employment Opportunity Commission (EEOC) and plaintiff-intervenor Darlene Walters (Walters) bring this action against Metropolitan Educational Enterprises, Inc. (Metropolitan) and Leonard Bieber (Bieber). Plaintiffs allege that Metropolitan and Bieber refused to promote Walters because of her sex and terminated her in retaliation for filing discrimination charges with the EEOC, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Walters also complains of retaliatory discharge and breach of her employment contract, in violation of Illinois law. Defendants maintain that this court lacks both federal jurisdiction over the Title VII claims and pendent jurisdiction over the state law claims because Metropolitan is not an "employer" within the meaning of Title VII. Before this court is defendants' motion to dismiss the case for lack of subject matter jurisdiction. For the reasons stated below, defendants' motion is granted.

DISCUSSION

The threshold issue in this case is whether Metropolitan qualifies as an "employer" under Title VII. This involves an interpretation of section 701(b) of Title VII, which provides that

> [t]he term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and any agent of such a person . . .

42 U.S.C. § 2000e(b). For the purposes of § 701(b), the

"current year" means the year in which the alleged discrimination occurred. *Norman v. Levy*, 756 F. Supp. 1060, 1062 n. 3 (N.D.Ill.1990), citing *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n. 4 (5th Cir.1980), *overruled on other grounds, Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549 (11th Cir.1988). Walters alleges that she was denied a promotion and then terminated in retaliation for filing a charge of discrimination with the EEOC in 1990. Accordingly, 1989 and 1990 are the years at issue in this case.

The parties have entered into certain stipulations regarding the number of employees employed by Metropolitan in the calendar year 1989, as well as the number of full- and part-time employees on Metropolitan's payroll in 1990, and the number of weeks that fifteen or more of these employees were working or were on paid leave in 1990. It is stipulated that defendants did not have fifteen or more employees working or on paid leave on each working day of twenty or more weeks during 1989 (Stip., ¶ 13). Metropolitan therefore does not fall within Title VII's definition of "employer" for 1989. The parties have also stipulated that Metropolitan had fifteen or more employees on its payroll for forty-seven weeks in 1990, but that in only nine of those weeks were there fifteen or more employees actually present at work or on paid leave on each working day of the week (Stip., ¶¶ 11-12).

The dispute in this case centers on the method of counting employees for Title VII purposes. Both sides agree that salaried employees are deemed employees for

every day of the week they are on the payroll, regardless of whether they are actually at work on a particular day. They disagree, however, on the status of part-time or hourly workers. Defendants maintain that the court is required to follow the method of counting employees set forth in *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353-54 (7th Cir.1983), and applied by this court in *Norman v. Levy*, 767 F.Supp. 1441, 1449 (N.D.Ill.1991). The EEOC, on the other hand, argues that *Zimmerman* was wrongly decided and that the court should employ a different method for counting employees.[1]

The plaintiff in *Zimmerman* advanced the theory that all hourly and part-time workers should be counted as employees under the Age Discrimination in Employment Act (ADEA) for each week that they are on the payroll. *Zimmerman*, 704 F.2d at 353. The Seventh Circuit rejected this interpretation. It held that hourly and part-time workers are considered employees under the ADEA only on days when they are either physically present at work or on paid leave. *Id.* at 353. The court based this finding on the language in section 11 of the ADEA, which provides that an employer must have twenty or more employees for *each working day* of a week before that week can be counted toward the jurisdictional minimum. *Id.* at 353-54. The court reasoned that the

[1] Plaintiff-intervenor Walters has conceded that, under *Zimmerman*, Metropolitan is not considered an "employer" for Title VII purposes. She acknowledges that this case must therefore be dismissed for lack of subject matter jurisdiction and that she must then ask the Seventh Circuit to reconsider *Zimmerman*.

plaintiff's proffered interpretation would render the "for each working day" language meaningless surplusage. *Id.*

The EEOC maintains that *Zimmerman* is contrary to the language, intent and purpose of Title VII and the ADEA. The EEOC alleges that public policy, principles of statutory construction, and Title VII's legislative history suggest that the method of counting employees should focus on whether an employee is on the employer's payroll rather than the employee's particular work schedule. The EEOC points to a number of decisions that have adopted the method of counting employees that the EEOC advocates, *see Evans v. Davie Truckers, Inc.*, 38 Fair Empl.Prac.Cas. (BNA) 1553, 1554 (M.D.N.C.1984), *aff'd*, 769 F.2d 1012 (4th Cir.1985); *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-35 (1st Cir.1983), *cert. denied*, 466 U.S. 904, 104 S.Ct. 1678, 80 L.Ed.2d 153 (1984); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl.Prac.Cas. (BNA) 1325, 1327, 1975 WL 3615 (D.Minn.1975), *aff'd*, 566 F.2d 1178 (8th Cir.1977), and others which soundly criticize the approach adopted in *Zimmerman*, *see e.g.*, *Wright v. Kosciusko Medical Clinic*, 791 F.Supp. 1327, 1332 (N.D.Ind.1992). The EEOC asks that this court modify the holding of *Zimmerman* to include all employees on the payroll, regardless of whether they were actually at work on a particular day.

This court cannot, however, modify Seventh Circuit precedent. That issue is properly left to the Seventh Circuit on appeal. It is true that *Zimmerman* was an ADEA case, while this case involves Title VII;

accordingly, *Zimmerman* is not binding authority *per se*. Nonetheless, it is well settled that cases interpreting Title VII can be used in interpreting the ADEA, and vice versa. "Because Title VII and the ADEA share 'a similar purpose—to stamp out discrimination in various forms—cases construing the definitional provisions of one [statute] are persuasive authority' when interpreting the provisions of the other." *Hayden v. La-Z-Boy Chair Co.*, 9 F.3d 617, 619 (7th Cir.1993), *cert. denied*, — U.S. —, 114 S.Ct. 1371, 128 L.Ed.2d 47 (1994), quoting *Hyland v. New Haven Radiology Assoc., P.C.*, 794 F.2d 793, 796 (2d Cir.1986), citing *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978) ("the prohibitions of the ADEA were derived *in haec verba* from Title VII"). While the Seventh Circuit has not addressed this issue in the context of Title VII, § 11 of the ADEA and § 701(b) of Title VII are virtually identical. We will therefore apply the employee counting method first set forth in *Zimmerman* and later applied in the Title VII context by this court in *Norman v. Levy*, 767 F.Supp. 1441, 1449 (N.D.Ill.1991).

The parties have stipulated that there were fifteen employees either present at work or on paid leave each day of the working week for only nine weeks of 1990 (Stip., ¶ 11). Since this falls below the jurisdictional minimum of twenty weeks, Metropolitan cannot be subject to Title VII liability for the calendar year 1990.

CONCLUSION

Metropolitan does not qualify as an employer under Title VII. The court therefore lacks jurisdiction over the subject matter of this case. The case is dismissed with prejudice.

APPENDIX C

RELEVANT PROVISIONS OF TITLE VII OF
THE CIVIL RIGHTS ACT OF 1964
42 U.S.C. § 2000e *et seq.*

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under

section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in

which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401 et seq.], and further includes any governmental industry, business, or activity.

* * * * *

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

§ 2000e-2. Unlawful employment practices

(a) **Employer practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-3. Other unlawful employment practices

(a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * * * *

RELEVANT PROVISIONS OF THE
AGE DISCRIMINATION IN EMPLOYMENT ACT
OF 1967
29 U.S.C. § 621 *et seq.*

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * * * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not

include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401 et seq.].

* * * * *

(l) The term "compensation, terms, conditions, or

privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

* * * * *

RELEVANT PROVISIONS OF THE
FAMILY AND MEDICAL LEAVE ACT OF 1993
29 U.S.C. § 2601 *et seq.*

§ 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include—

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a work site at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that work site is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer"—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer; and

(iii) includes any "public agency," as defined in Section 203(x) of this title.

* * * * *

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

* * * * *

APPENDIX D

[Record Cite: R. 38, Ex. 2]

EEOC Notice No. N-915-052
04/20/90

1. **SUBJECT**: Policy Guidance: Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA.

2. **PURPOSE**: This policy statement sets forth the Commission's position on the issue of whether part-time employees may be counted to satisfy the threshold number of employees for jurisdictional purposes.

3. **EFFECTIVE DATE**: Upon receipt.

4. **EXPIRATION DATE**: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. **ORIGINATOR**: Title VII/EPA Division, Office of Legal Counsel.

6. **INSTRUCTIONS**: File after § 605.8(b) of Volume II of the Compliance Manual.

7. **SUBJECT MATTER**:

I. INTRODUCTION

This policy statement analyzes whether a part-time employee may be counted as an employee within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA to satisfy the requisite number of employees for coverage.[1] The requirement of fifteen or more employees is a jurisdictional prerequisite for Title VII coverage, while twenty or more employees is a jurisdictional prerequisite for ADEA coverage.[2]

Section 701(b) of Title VII, 42 U.S.C. 2000e(b), defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ."

---

[1]This policy guidance is intended as an amendment and clarification to § 605.8(b) of Volume II of the EEOC Compliance Manual and will supersede any guidance to the contrary.

[2]The Commission has taken the position, in an appellant brief, that all state and local governments are covered by the ADEA, regardless of the number of its employees. See EEOC Brief in *EEOC v. Monclova Township*, (No. 89-4038) (filed January 11, 1990), *citing with approval EEOC v. Hudson Township*, 40 FEP Cases 691, 692, 40 EPD ¶ 36,129 (N.D. Ohio 1986). *But see Schaefer v. Transportation Media, Inc.*, 859 F.2d 1251, 47 EPD ¶ 38,350 (7th Cir. 1988); *Kelly v. Wauconda Park District*, 801 F.2d 269, 41 EPD ¶ 36,694 (7th Cir. 1986), *cert. denied*, 480 U.S. 940, 42 EPD ¶ 36,847 (1987); *Smith v. Wythe-Grayson Regional Library Board.*, 657 F. Supp. 1216 (W.D.Va. 1987).

Section 701(f) of Title VII, 42 U.S.C. 2000e(f), defines an employee as "an individual employed by an employer . . ." Section 11(b) of the ADEA, 29 U.S.C. 630(b), defines an employer as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ."[3] Section 11(f) of the ADEA, 29 U.S.C. 630(f), defines an employee as "an individual employed by any employer . . ."

Neither Title VII nor the ADEA specifically defines the phrase "for each working day," as used in § 701(b) and § 11(b), and federal courts are split with regard to the method for determining whether an employer has the requisite number of employees. The majority of courts that have addressed the issue have concluded that the proper standard in determining whether an employer has the requisite number of employees is to count the number of employees maintained on the payroll in a given week, rather than the number of employees who report to work on any given day. Therefore, all regular part-time employees are counted whether they work part of each day or part of each week. *See Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634, 32 EPD ¶ 33,810 (1st Cir. 1983) (Title VII), *cert. denied*, 466 U.S. 904, 33 EPD ¶ 34,228 (1984); *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n.7, 22

[3]Judicial decisions interpreting either § 11(b) of the ADEA or § 701(b) of Title VII are persuasive authority for the other, in view of the important similarities in language, structure, and purposes. The ADEA's definition of "employer" was patterned after Title VII and contains virtually identical language.

EPD ¶ 30,715 (5th Cir. 1980) (Title VII); *Gorman v. North Pittsburgh Oral Surgery Associates*, 664 F. Supp. 212, 214, 45 EPD ¶ 37,734 (W.D. Pa. 1987) (ADEA); *Evans v. Davie Truckers*, 38 FEP Cases 1553, 1554 (M.D.N.C. 1984) (Title VII), *aff'd*, 769 F.2d 1012, 38 FEP Cases 1555, 37 EPD ¶ 35,472 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20, 33 FEP Cases 541 (M.D. Tenn. 1983) (Title VII); *Hornick v. Borough Of Duryea*, 507 F. Supp. 1091, 1098, 25 EPD ¶ 31,569 (M.D. Pa. 1980) (Title VII); *Pedreyra v. Cornell Prescription Pharmacies*, 465 F. Supp 936, 941, 19 EPD ¶ 9,009 (D. Colo. 1979) (Title VII); *Pascutoi v. Washburn-McReary Mortuary*, 11 FEP Cases 1325, 1327, 10 EPD ¶ 10,442 (D.Minn. 1975) (Title VII), *aff'd*, 566 F.2d 1178, 20 EPD ¶ 30262 (8th Cir. 1977). *See also Musser v. Mountain View Broadcasting Inc.*, 578 F. Supp. 229, 230 (E.D. Tenn. 1984) (citing *Lynn v. JER Corp.* with approval) (Title VII); B. Schlei & P. Grossman, *Employment Discrimination Law*, 996 (2d ed. 1983); 1 Larson, *Employment Discrimination*, § 5.32 (1987).

The minority view is that part-time employees should be counted only if they work some portion of each day of the work week. Courts which ascribe to this view assert that the words "for each working day" in § 701(b) and § 11(b) necessarily import Congressional intent to restrict application of the statute to employers who had the requisite number of employees actually at work on each working day in each of twenty or more calendar weeks. Under this construction, the actual number of days worked is crucial in determining whether the part-time employee is counted as an employee. *See Zimmerman v. North*

American Signal Co., 704 F.2d 347, 353-54, 31 EPD ¶ 33,486 (7th Cir. 1983) (ADEA); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991, 32 EPD ¶ 33, 626 (8th Cir. 1983) (ADEA); *Schoenbaum v. Orange County Center for Performing Arts*, 677 F. Supp. 1036, 1039, 44 EPD ¶ 37,499 (C.D. Cal. 1987) (ADEA); *Greear v. C.E. Electronics, Inc.*, No. C87-7749 (N.D. Ohio Aug. 3, 1988) (Title VII).

The Commission's position is that all part-time employees are counted whether they work part of each day or part of each week, as long as they are on the payroll.[4] We find no basis in the legislative history, canons of statutory interpretation, or public policy to support the *Zimmerman* position.

II. LEGISLATIVE HISTORY

The legislative history of Title VII indicates that the proper focus when determining whether an employee should be counted toward the fifteen employee requirement is whether an employment relationship exists,

[4]The Commission rejects the position taken in *Takeall v. Werd, Inc.*, 23 FEP Cases 947, 948, 19 EPD ¶ 9,035 (M.D. Fla. 1979) (Title VII), which held that those persons who merely "filled in" for a very short period of time for regular employees taking a day off or on vacation are not to be counted as "employees". The court noted that this case is distinguished from cases where an employer employs regular part-time employees on an on-going basis. The Commission believes that a person "filling in" for a regular employee should be counted as an employee during any week that (s)he is actually on the payroll.

not an employee's particular work schedule.

As noted by the First Circuit in *Thurber v. Jack Reilly's, Inc.*, the legislative history of Title VII reveals that the definition of "employer" was borrowed from the Unemployment Compensation Act, 26 U.S.C. § 3304 (1954), 110 Cong. Rec. 13087 (1964). 717 F.2d at 634. The IRS, enforcement agency of the Federal Unemployment Tax Act, ruled, in Revenue Rule 55-19 (1955), that an employee is to be counted under the Unemployment Compensation Act for each day that an employment relationship exists, regardless of whether the employee reported to work each day. This rule had been in effect for nine years before enactment of Title VII. It is appropriate to assume that since Congress specifically modeled the term "employer" from the Unemployment Compensation Act, it was aware of the enforcing agency's interpretations of "employer" and intended that "employer" under Title VII would be interpreted in the same manner. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-698, 19 EPD ¶ 9,202 (1979).

The First Circuit further noted that there is nothing in the legislative history to indicate a Congressional intent to require that employees report to work on each day that they are included. 717 F.2d at 635. If Congress had intended to exclude part-time employees, it would have expressly so stated. However, since no distinction was made between part-time and full-time employees, Congress clearly intended no distinction between employees on the basis of their work schedules.

III. STATUTORY CONSTRUCTION

The relevant principles of statutory construction are set forth in *Sutherland's Statutory Construction*,[5] which states that:

> The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislation and if the words are sufficiently flexible to allow a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read to conform to the spirit of the act. While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words.

As discussed above, the legislative history indicates that Congress intended for all part-time employees to be counted. The literal interpretation of "for each working day", the *Zimmerman* approach, is contrary to that intent, particularly since Title VII is a remedial statute and the prevailing majority in Congress intended to give it broad effect. 110 Cong. Rec. 13087-13093 (1964) (Comments of Senators Morse, Saltonstall and others).

Further, the phrase "for each working day" is

[5]N. Singer, 2A *Sutherland's Statutory Construction*, § 46.07 (1984).

sufficiently flexible to allow a construction which will effectuate the legislative intent. Even a literal reading of "for each working day" lends itself to a payroll standard inasmuch as "for each working day" does not literally mean "at work," nor does the statutory language of § 701(b) or § 11(b) contain any limitation indicating that only those individuals actually at the work site on each working day are to be considered employees under Title VII.

Liberal construction should be given to the definition of employer so as to carry out the Congressional purpose of eliminating inconvenience, unfairness and the humiliation of discrimination. *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131, 23 EPD ¶ 30,933 (5th Cir. 1980); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391, 14 EPD ¶ 7,775 (8th Cir. 1977). Those courts adopting a payroll standard stressed that it is in accord with the universally held principle that Title VII is a remedial statute that should be given the broadest possible interpretation consistent with its humanitarian purpose. *Thurber*, 717 F.2d at 634-635; *Pedreyra*, 465 F. Supp. at 941; *Pascutoi*, 11 FEP Cases at 1326-1327.

Moreover, Title VII defines "employee" broadly as an "individual employed by an employer." It is of critical significance that the statute itself does not limit the definition of employee by the number of hours worked each day. *Pedreyra*, 465 F. Supp. at 941. In *Armbruster v. Quinn*, 711 F.2d 1332, 1340, 32 EPD ¶ 33,702 (6th Cir. 1983), the court stressed that "the term employee is clearly

to be given a broad construction under all provisions of the Act." "Were there a[ny] doubt or ambiguity in the matter," the court held, "we would resolve it in favor of coverage." *Id.* at 1341.

IV. PUBLIC POLICY CONSIDERATIONS

Public policy considerations weigh in favor of the broadest possible interpretation and dictate against the consequences that a stricter construction would have.

Under the *Zimmerman* approach, an employee who works two hours on each day of a five-day work week is counted towards the fifteen employee requirement for that week. Yet, an employee who works eight hours a day for four days of a five-day work week is not counted on the fifth day and therefore, not counted for that week, even though this employee would have worked more than three times as many hours. Also, conceivably under this approach, an employer who has a seven-day work week could claim that an employee who works eight hours per day for five days per week is not at work on each of the seven working days and therefore may not be counted as an employee. Employers could therefore manipulate work schedules to avoid coverage under Title VII. In rejecting this approach, *Gorman v. North Pittsburgh Oral Surgery Associates* reasoned that, "[u]nder this construction [the *Zimmerman* approach], a business that operates almost entirely with part-time labor could escape the prohibitions of the ADEA, despite the number of workers actually

employed." 664 F. Supp. at 214.

Further, proof under the *Zimmerman* approach would be difficult for plaintiffs to obtain. Even assuming that an employer kept and maintained time cards and leave records, it would be an extremely tedious task to determine how many employees reported to work each day during the two-year period provided for by the statute. Although an employer's payroll records may indicate the number of hours an employee worked in a given week, they may not reveal on which days an employee reported to work.

Results such as those discussed above would not occur if the number of employees maintained on the payroll is counted when determining whether the fifteen employee requirement is met. The payroll is a reliable indicator of those individuals who have an employment relationship with the employer and are therefore employees.

Therefore, statutory construction permits, and policy considerations and congressional intent mandate that under Title VII an employer who has fifteen employees on the payroll for twenty weeks of the year meets the statutory definition of employer, while under the ADEA an employer who has twenty employees on the payroll for twenty weeks of the year meets the statutory definition of employer.

V. CONCLUSION

The Commission's position is that all regular part-time employees are counted whether they work part of each day or part of each week.

Example:

Employer has a work sharing plan to meet the growing demand of employees who desire to work part-time. Employer has three full-time and twelve part-time employees. Six of the twelve part-time employees work three days per week, while the other six part-time employees work four hours per day each of the five working days. All twelve of the part-time employees are counted because they are all regular part-time employees on an on-going basis. Therefore, Employer is covered by Title VII.

4/20/90
Date

/s/
Evan J. Kemp, Jr.
Chairman

Supreme Court, U.S.
FILED
AUG 25 1995
CLERK

No. 95-259

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DARLENE WALTERS,
PETITIONER,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC.
AND LEONARD BIEBER.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, petitioner Darlene Walters respectfully files this Supplemental Brief.

Petitioner files this Supplemental Brief to draw the Court's attention to the regulations promulgated by the Department of Labor under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (Supp. V 1993) (FMLA).

ADDITIONAL REASONS FOR GRANTING THE PETITION

As petitioner noted in her Petition, the FMLA's definition of employer, 29 U.S.C. § 2611(4) (Supp. V 1993), includes precisely the same "for each working day" phrase included in the definition of employer in Title VII, the statute at issue in this case. 42 U.S.C. § 2000e(b) (1988).

Petitioner argued that this phrase in the FMLA is likely to be construed under the payroll method, that is, any employee on the employer's payroll in a calendar week is to be counted for jurisdictional purposes whether or not the employee was present at work each day of that week. (Petition, p. 19-20). That payroll method was rejected by the Seventh Circuit in this case.

Petitioner has discovered that the Department of Labor has issued FMLA regulations that do in fact adopt the payroll method of counting employees. 29 C.F.R. § 825.100 *et seq.*, 60 Fed. Reg. 2179, 2238 (Jan. 6, 1995) (App., *infra*, 1a).

As Section 825.105 of the Department of Labor's FMLA regulations provides in pertinent part:

> (b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is

> received for the week. . . .
>
> (c) . . . Part-time employees, like full-time employees, are considered to be employed each working day of a calendar week, as long as they are maintained on the payroll.

29 C.F.R. § 825.105(b) & (c), 60 Fed. Reg. 2240 (Jan. 6, 1995).

Thus, the conflict grows in the construction of this jurisdictional language contained in various statutory schemes. The importance of the issue presented is clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST, 1995

SUPPLEMENTAL APPENDIX

RELEVANT PROVISIONS OF THE FINAL REGULATIONS IMPLEMENTING THE FAMILY AND MEDICAL LEAVE ACT OF 1993 29 C.F.R. PART 825, 60 FED. REG. 2179 (1995)

§ 825.104 ***What employers are covered by the Act?***

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

* * * * *

§ 825.105 ***In determining whether an employer is covered by FMLA, what does it mean to employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year?***

* * * * *

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week.

However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

* * * * *

Supreme Court, U.S.
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Nos. 95-259 and 95-779

In The

Supreme Court of the United States

October Term, 1995

DARLENE WALTERS and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioners,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC. and LEONARD D. BIEBER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Congress restricted the application of Title VII of the Civil Rights Act of 1964 to "employer[s]." Section 701(b) of Title VII defines the term "employer" with reference to the number of employees a defendant "has . . . for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). This case presents two methods of determining whether a defendant had the requisite number of employees for the requisite number of weeks to qualify as an "employer" subject to Title VII of the Civil Rights Act of 1964 as amended.

The question presented is whether an individual should be counted toward the jurisdictional minimum only on those days he or she is at work or is otherwise paid, or for each day of a calendar week merely because he or she is on the payroll each day during that week.

PARTIES TO THE PROCEEDINGS

Respondent, Metropolitan Educational Enterprises, Inc., has no parent companies or subsidiary companies to be listed pursuant to Rule 29.6

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Metropolitan Educational Enterprises, Inc. and Leonard D. Bieber, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the court of appeals (95-259 Pet. App. 1a-12a) is reported at 60 F.3d 1225. The opinion of the district court (95-259 Pet. App. 13a-19a) is reported at 864 F. Supp. 71.

JURISDICTION

On July 18, 1995, the court of appeals entered its judgment affirming the district court's dismissal of the petitioners' action for want of subject matter jurisdiction. Walters filed her petition for a writ of certiorari (No. 95-259) on August 14, 1995 and a supplemental brief in support of her petition on August 24, 1995.

On October 10, 1995, Justice Stevens granted the Solicitor General's application for an extension of time to file a petition for a writ of certiorari on behalf of the Equal Employment Opportunity Commission to and including November 15, 1995. The Solicitor General filed its petition for a writ of certiorari (No. 95-779) on November 15, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . .

42 U.S.C. § 2000e(b). Section 701(b) and other relevant provisions of Title VII of the Civil Rights Act of 1964, are reprinted at 95-259 Pet. App. 20a-23a.

STATEMENT OF THE CASE

1. Metropolitan Educational Enterprises, Inc. sells and finances encyclopedias and other educational materials in interstate commerce. R. 40 ¶ 1. Leonard Bieber is the president of Metropolitan.

Darlene Walters was employed by Metropolitan as a collector from January 3, 1986 until she resigned on Tuesday, April 10, 1990. Two days after she resigned, Walters filed a charge of discrimination against Metropolitan. Her charge alleged that in September 1989, some eight months earlier, Metropolitan had denied her a promotion to the position of credit manager on account of her gender. The

EEOC investigated the charge and later determined that the evidence did not establish a violation because the individual Metropolitan hired was better qualified for the position.

Walters returned to Metropolitan and asked to be rehired on Friday, April 13, 1990. Metropolitan allowed Walters to return to the job from which she had resigned only three days earlier.

On Monday, April 23, 1990, Metropolitan learned that Walters had been seeking employment with one of its competitors and terminated Walters for unsatisfactory job performance. Walters filed a second charge of discrimination against Metropolitan on April 30, 1990. In her second charge of discrimination, Walters alleged that Metropolitan had retaliated against her for having filed the charge of discrimination based upon its failure to promote her to the position of credit manager.

2. The EEOC filed suit against Metropolitan and its president, Bieber, on April 7, 1993. The EEOC invoked the district court's jurisdiction under Sections 706(f)(1) and 706(f)(3) of Title VII. 42 U.S.C. §§ 2000e-5(f)(1), (f)(3). In addition, the EEOC invoked the district court's jurisdiction under 28 U.S.C. § 1343(a)(4) (vesting the district courts with original jurisdiction in civil rights cases) and 28 U.S.C. § 1345 (vesting the district courts with original jurisdiction of civil actions commenced by agencies of the United States).

The EEOC alleged that Metropolitan had retaliated against Walters in violation of Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), by discharging her for having filed a charge of discrimination. Walters intervened as a matter

of right under 42 U.S.C. § 2000e-5(f)(1) and Rule 24(a)(1) of the Federal Rules of Civil Procedure. Her amended complaint reiterated the EEOC's retaliation claim. Walters further alleged a Title VII claim based upon Metropolitan's failure to promote her and pendent claims for breach of contract and wrongful termination under Illinois law.[1]

3. Metropolitan and Bieber moved to dismiss for lack of subject matter jurisdiction on the ground that Metropolitan was not an "employer" as defined by Section 701(b) of Title VII, 42 U.S.C. § 2000e(b). Respondents argued that Metropolitan did not employ fifteen or more employees on each working day in each of twenty or more calendar weeks in either 1989 or 1990. R. 25; R. 26 at 5. To support their argument, respondents relied upon the Seventh Circuit's decision in *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983), holding that hourly paid workers are not counted toward the jurisdictional minimum number of employees on days when they are neither working nor on paid leave.[2] *See id.* at 354.

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[1] Walters had previously filed an action against the respondents. *Darlene Walters v. Metropolitan Educational Enterprises, Inc. and Leonard Bieber*, No. 92 C 8357 (N.D. Ill., filed Dec. 23, 1992). She voluntarily dismissed that action after the district court granted her leave to intervene in the EEOC's case.

[2] In *Zimmerman*, the court construed the definition of "employer" under Section 11(b) of the Age Discrimination in Employment Act. 29 U.S.C. § 630(b). Both the courts and the petitioners have recognized that the ADEA's definition of "employer" was patterned after Title VII and that the only relevant difference between the two provisions is that Title VII requires a minimum of 15 employees, and the ADEA requires a minimum of 20. *See, e.g., Zimmerman v. North American Signal Co*, 704 F.2d 347, 352 (7th Cir. 1983); *see also* EEOC C.A. Br. at 14 n. 14; Walters C.A. Br. App. A-9, A-10. The EEOC has acknowledged that *Zimmerman's* interpretation of the definition of "employer" under the ADEA is controlling in the context of Title VII. EEOC C.A. Br. at 14 n. 14.

Metropolitan prepared an exhibit to its motion consisting of worksheets for each calendar week of 1989 and 1990. R. 26 at Tab 5. The worksheets listed the names of each employee on Metropolitan's payroll for the week, the number of hours each employee worked each day and the number of hours for which each employee received holiday pay, sick pay or vacation pay.

Petitioners successfully moved to strike the exhibits to Metropolitan's motion, R. 31-32, and conducted discovery on two central issues. Much of the discovery in this case focused upon whether independent sales representatives were Metropolitan's "employees."[3] Petitioners also undertook to determine the number of employees on Metropolitan's payroll each week and the number of days on which each employee worked or for which they were otherwise paid. The parties compiled weekly summaries of Metropolitan's payroll records for each calendar week of 1990[4] similar to those which Metropolitan had appended to its motion to dismiss. R. 37.

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[3] Walters later stipulated that these sales representatives were independent contractors, not employees. R. 40; 95-259 Pet. at 6.

[4] The parties stipulated that Metropolitan did not have 15 or more employees working or on paid leave on each working day of twenty or more weeks during 1989. R. 37 at ¶ 13; Pet. 95-259 at 5-6; Pet. 95-779 at 6 n. 5. Accordingly, the district court concluded that Metropolitan did not fall within Title VII's definition of "employer" for 1989. 864 F. Supp. 71, 72, 95-259 Pet. App. 15a.

The parties submitted their weekly summaries of Metropolitan's payroll records to the district court and stipulated to the following facts. Metropolitan had 15 or more employees working or on paid leave on each working day in only nine calendar weeks in 1990. R. 37 at ¶ 11; 864 F. Supp. at 72; 95-259 Pet. App. 15a. During the remaining 43 calendar weeks of 1990, Metropolitan did not have 15 or more employees working or on paid leave on each working day. R. 37 at ¶ 11; *see* 864 F. Supp. at 72, 95-259 Pet. 15a. The parties further stipulated that there were 15 or more employees on Metropolitan's payroll during 47 weeks in 1990. R. 37 ¶ 12; 864 F. Supp. at 73; 95-259 Pet. App. 15a.

The EEOC argued that *Zimmerman* was wrongly decided and urged the district court to count the number of employees on Metropolitan's weekly payroll regardless of whether they were actually at work or paid for a particular day. 864 F. Supp. at 72-73, 95-259 Pet. App. 17a-18a. The district court rejected the EEOC's proposed "payroll method" and instead applied the method of counting employees set forth in *Zimmerman*. Under this method, the court held that Metropolitan had not employed 15 or more individuals on each working day of 20 calendar weeks during 1990 and dismissed the action for want of subject matter jurisdiction.

4. The Seventh Circuit reaffirmed its holding in *Zimmerman* and affirmed the district court's dismissal of petitioners' action.

REASONS FOR DENYING THE PETITION

1. Respondents acknowledge that the courts of appeals have adopted two methods of counting "employees" and that these methods can lead to different results in determining whether a defendant is an "employer" subject to Title VII of the Civil Rights Act of 1964. However, petitioners have overstated the extent of the conflict between the decision of the Seventh Circuit and the rulings of other federal courts. They have also exaggerated the importance of this conflict. Accordingly, the petition should be denied.

a. While the Fifth Circuit adopted the payroll approach, its decision in *Dumas v. Town of Mt. Vernon*, 612 F.2d 974 (5th Cir. 1980) is not in irreconcilable conflict with the Seventh Circuit's rulings in this case or in *Zimmerman*. Indeed, a careful reading of *Dumas* reveals that its adoption of the payroll method was mere dictum relegated to a footnote. *See Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n. 7 (5th Cir. 1980).

In *Dumas*, the district court found that the defendant municipality had employed as many as 24 employees during the relevant years, but that it never had more than 12 full-time employees[5] on its payroll. *Dumas*, 436 F. Supp. 866, 870, 872 (S.D. Ala. 1977). The district court made no specific findings regarding the number of weeks each employee had worked during the relevant years. *Dumas*, 612 F.2d 974, 979. The court of appeals concluded

[5] The full-time employees worked forty hours during a five-day work week. *Dumas v. Town of Mt. Vernon*, 436 F. Supp. 866, 870.

that even if all of the town's CETA and part-time employees were counted toward the jurisdictional minimum for each day they were on the payroll regardless of whether they were actually working on a particular day, the town still did not employ 15 or more employees in at least 20 weeks. *Id.* Thus, whether the Town of Mt. Vernon was an "employer" did not depend upon the counting method the Fifth Circuit adopted.

b. While the First Circuit has adopted the payroll method, neither of its two decisions applying the payroll method have cited, much less analyzed, *Zimmerman*.

When the First Circuit adopted the payroll method of counting employees, it stated that "every court which has addressed the issue" had done so. *See Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984). The court failed to acknowledge that the Seventh Circuit had already adopted a different method in *Zimmerman*. Worse, the *Thurber* court failed to cite or discuss *Zimmerman*. Instead, it relied in part upon *Pascutoi v. Washburn-McReavy Mortuary*, 11 Empl. Prac. Dec. ¶ 10,441 (D. Minn. 1975), *aff'd without opinion*, 466 F.2d 1178 (8th Cir. 1977). Four months earlier, however, the Eighth Circuit had rejected the payroll approach applied in *Pascutoi* and adopted *Zimmerman*. *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983).

The First Circuit's more recent decision in *Vera-Lozano v. International Broadcasting*, 50 F.3d 67 (1st Cir. 1995) likewise failed to cite or analyze the Seventh Circuit's ruling in *Zimmerman*.

c. Petitioners also urge this Court to grant review because the district courts have adopted different

approaches to counting employees under Title VII. Once again, petitioners have exaggerated the extent of the conflict among the district courts. Three of the decisions cited by petitioners were decided before *Zimmerman*. *Hornick v. Borough of Duryea*, 507 F. Supp. 1091 (M.D. Pa. 1980); *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936 (D. Colo. 1979); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Empl. Prac. Dec. (CCH) ¶ 10,441 (D. Minn. 1975).

Three of the remaining decisions cited by petitioners are inapposite because the selection of a method for counting employees was not before the court. In *Sheperdson v. Local Union No. 401*, 823 F. Supp. 1245 (E.D. Pa. 1993), for example, the court's decision turned upon *whether* certain individuals should be counted, not *how* they should be counted. *Id.* at 1246. Since the court concluded that the individuals in question were not "employees," it did not have occasion to adopt a method for counting employees. *See id.* at 1257. The courts faced the same issue and reached similar conclusions in *Reith v. Swenson*, 66 Fair Empl. Prac. Cas. (BNA) 885 (D. Kan. 1993) (exclusion of individuals from pool eligible to be counted as "employees" precluded possibility that bank could qualify as an "employer") and in *Simmons v. Vliets Farmers Cooperative Association*, 55 Fair Empl. Prac. Cas. (BNA) 1341 (D. Kan. 1991) (cooperative did not employ the requisite number of employees for the requisite number of weeks under Title VII or ADEA even when truck driver, farmers and directors were counted as "employees".)

Three of the cases cited by petitioners fail to acknowledge or discuss *Zimmerman*. *Sheperdson v. Local*

Union No. 401, 823 F. Supp. 1245 (E.D. Pa. 1993); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553 (D. Kan. 1991); *Lynn v. JER Corp.*, 573 F. Supp. 17 (M.D. Tenn. 1983). Indeed, the district courts in these cases, none of which were bound by controlling precedent within their respective circuits, neither analyzed nor acknowledged the different counting methods.

Several other cases are not even reported in the Federal Supplement or Federal Rules Decisions. The importance of these decisions and their precedential value are questionable.

d. Petitioners suggest that the continued application of the *Zimmerman* will increase the burden upon both the EEOC and the already overburdened district courts. History belies their dire forecast of an EEOC and district courts whose time will be consumed by counting employees. To the contrary, this case, and those like it are anomalies.

In the more than 30 years since Title VII became law, the issue before this Court has arisen in only 15 reported decisions. The EEOC, which is charged with the administration and enforcement of Title VII, appears to have litigated this issue in only two other cases since its creation. *EEOC v. Garden & Associates, Ltd.*, 956 F.2d 842 (8th Cir. 1992); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705 (S.D. Ohio 1989).

2. Petitioners portend conflicting decisions and potentially inconsistent results in future cases decided under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, and the Family and Medical Leave

Act of 1993, 29 U.S.C. § 2601 *et seq.*[6] The court below noted "[w]e have not yet been asked to interpret the FMLA and decline to create a conflict where none yet exists." 60 F.3d at 1230; 95-259 Pet. App. 11a. The Solicitor General properly concedes that neither of these statutes is before this Court in this case. 95-779 Pet. at 20-21. How employees should be counted under other statutes should be properly left for another day when that issue becomes ripe for adjudication and a proper record is developed for this Court's consideration.

3. Petitioners assail the circuit court's ruling because it might tend to exclude individuals with flexible work schedules or other more innovative employment arrangements. As respondents noted above, Title VII is now more than 31 years old. Since its enactment, our nation has undergone many changes. "Flextime" and "telecommuting" were unknown phenomena when families gathered around the television to watch Ed Sullivan in 1964. If Title VII is no longer suited to afford adequate protection against discrimination in our changing society, then the task of adapting Title VII to the practical realities of 1996 rests with the Congress, not with this Court. As Judge Ripple noted in his concurring opinion, any ambiguity arising from the divergence of the decisions deserves legislative attention. 60 F.3d at 1230; 95-259 Pet. App. 12a.

4. The court below fully considered and correctly decided the issue before it.

---

[6] Neither petitioner has cited authority demonstrating that courts have adopted differing methods of counting "employees" for purposes of the ADA or the FMLA.

a. The Seventh Circuit's interpretation is consistent with the plain language of the statute and accords meaning to the phrase "for each working day." Respondents' interpretation gives effect to the phrase "for each working day" only if one accepts the proposition that Congress intended that phrase to exclude individuals who begin or end their employment during a week. As the court noted below, it is highly doubtful that Congress intended to do so. 60 F.3d at 1228; 95-259 Pet. App. 6a.

b. The legislative history of Title VII does not support the payroll method. In *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983), the First Circuit seized upon Senator Dirksen's isolated comment that Congress had borrowed the definition of the term "employer" from the Unemployment Compensation Act. *Id.* at 634; *see also* 26 U.S.C. § 3306(a); 110 Cong. Rec. 13087 (1964); Walters C.A. Br. App. A-27.

Contrary to that analysis, the term "employer" is defined far differently under the Unemployment Compensation Act than under Title VII. Respondents' C.A. Br. at 15. The Unemployment Compensation Act defines "employer" with reference to the number of *days* on which a person has "employed at least one individual. . . . " 26 U.S.C. § 3306(a) (emphasis added). Title VII, by contrast, defines "employer" with reference to the number of *individuals* a person employed as well as the number of weeks during which he or she employed the requisite number of individuals.

The *Thurber* court compounded its error by grafting onto Title VII a 1955 Revenue Ruling holding that

employees are to be counted under the Unemployment Compensation Act throughout the existence of an employment relationship and without regard to when the employee in fact worked. *Thurber*, 717 F.2d at 633-34; *see also* Rev. Rul. 55-19, 1955 C.B. 496. *Thurber* was wrongly decided. Its flawed analysis of the legislative history of Title VII casts doubts upon its precedential value and that of its progeny.

c. The EEOC's interpretation of Title VII's definition of "employer" was not entitled to deference. The EEOC suggests that the conflicting interpretations courts have accorded Title VII's definition of "employer" reflects its ambiguity. As respondents have argued above, however, the conflicts are neither as numerous nor as direct as petitioners suggest. Much of the apparent conflict stems not from any ambiguity in the language of the statute, but from the district courts' misplaced reliance upon the *dictum* found in a footnote in *Dumas v. Town of Mt. Vernon*, 612 F.2d 974 (5th Cir. 1980) and the flawed reasoning of *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983). The Seventh Circuit properly concluded that the definition of "employer" is unambiguous. 60 F.3d at 1228; 95-259 Pet. App. 6a. Accordingly, the court was precluded from deferring to the EEOC's interpretation. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984).

Respondents have argued above that the EEOC's interpretation is not reasonable.

The EEOC contends that the court of appeals should have deferred to its interpretation because the court had not yet ruled upon the precise issue before the court *viz.*,

the interpretation of Title VII's definition of "employer." The EEOC has acknowledged that *Zimmerman's* interpretation of the definition of "employer" under the ADEA is controlling in the context of Title VII. EEOC C.A. Br. at 14 n. 14; R. 38 at 7 n. 6. Indeed, the EEOC's 1990 Policy Guidance, one of the very pronouncements to which it seeks deference, purports to address the definition of "employer" under both the ADEA and Title VII. 95-259 Pet. App. 30a-40a; EEOC C.A. Br. App. A-9 through A-14.

The lower court's refusal to defer to the EEOC's interpretation was based, in part, upon the court's finding that its decision in *Zimmerman* predated the Commission's Compliance Manual. 60 F.3d at 1229; 95-229 Pet. App. 10a. Now the EEOC argues, for the first time in this Court, that the court of appeals erred in overlooking an opinion its General Counsel issued in 1966. The EEOC failed, however, to cite this earlier pronouncement in the courts below. The only pronouncement the EEOC cited below was its 1990 Policy Guidance. EEOC C.A. Br. 7 n. 10, 14 n. 14; R. 38 at 14 and Exhibit 2.

CONCLUSION

Respondents respectfully request that the petitions for a writ of certiorari be denied.

Respectfully submitted,

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Nos. 95-259 and 95-779

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DARLENE WALTERS AND
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METROPOLITAN EDUCATIONAL ENTERPRISES, INC.
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Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

JOINT APPENDIX

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The following opinion, decisions, judgments and orders have been omitted in printing the Joint Appendix because they appear on the following pages in the appendix to the Petition for Certiorari in case No. 99-259:

Opinion of the United States Court of Appeals for the Seventh Circuit, July 18, 1995 ..... 1a

Decision of the United States District Court for the Northern District of Illinois, August 30, 1994 ..... 13a

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 93 C 2099

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND DARLENE WALTERS,

Plaintiffs,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC. AND LEONARD BIEBER,

Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	DESCRIPTION
04/07/93	1	Complaint of plaintiff Equal Employment Opportunity Commission.
04/29/93	2	Answer by defendant Metropolitan Educational Enterprises, Inc.
04/29/93	3	Answer by defendant Leonard Bieber
05/20/93	9	Motion by Darlene Walters to intervene.
05/20/93	--	Transcript of Hearing on Motion to intervene

5/20/93	10	Minute Order by Hon. James B. Moran: Granting motion to Ms. Walters intervene and giving leave to file her amended intervening complaint.
5/20/93	11	Intervenor's Complaint by Darlene Walters.
6/17/93	12	First Amended Intervenor's Complaint by Darlene Walters.
7/14/93	20	Answer to Intervenor's First Amended Complaint and Affirmative Defenses by defendant Metropolitan Educational Enterprises, Inc.
7/14/93	21	Answer to Intervenor's First Amended Complaint by defendant Leonard Bieber.
8/13/93	25	Motion by defendants to dismiss complaints for lack of jurisdiction over the subject matter.
8/13/93	26	Memorandum by defendants in support of motion to dismiss complaints for lack of subject matter jurisdiction.
8/20/93	27	Minute Order of 8/20/93 by Hon. James B. Moran: Status hearing held; continued to 10/06/93.

10/6/93	28	Minute Order of 10/6/93 by Hon. James B. Moran: Status hearing held; continued to 12/06/93. Defendant to respond to outstanding discovery by 10/13/93.
12/6/93	29	Minute Order of 12/6/93 by Hon. James B. Moran: Status hearing held; continued to 1/14/94.
1/14/94	30	Minute Order of 1/14/94 by Hon. James B. Moran : Answer brief to motion to dismiss complaints due 3/14/94. Reply to answer brief due 3/24/94 Status hearing held; continued to 4/7/94.
3/4/94	31	Motion by intervenor plaintiff Darlene Walters to compel discovery, to strike affidavit of defense counsel and, to extend briefing schedule.
3/4/94	--	Transcript of Hearing on Motion of Ms. Walters to compel discovery, *etc.*
3/4/94	32	Minute Order of 3/4/94 by Hon. James B. Moran : Granting in part and denying in part motion to compel discovery motion to strike affidavit of defense counsel motion to extend briefing schedule pursuant to discussion in open court on the record. Plaintiffs' answers to motion to dismiss complaints due 4/18/94. Reply

to answer brief due 4/28/94. Status hearing set for 4/7/94 at 9:45 am is stricken.

4/15/94 33 Agreed Joint Motion by EEOC and Darlene Walters to extend briefing schedule.

4/15/94 34 Minute Order of 4/15/94 by Hon. James B. Moran : Granting agreed joint motion to extend briefing schedule. Answer briefs to motion to dismiss complaints extended to 5/23/94. Reply to answer briefs due 6/3/94.

5/20/94 35 Motion by plaintiff EEOC and plaintiff-intervenor Darlene Walters for extension of time to file their briefs on the pending jurisdictional issue.

5/20/94 36 Minute Order of 5/20/94 by Hon. James B. Moran: Granting plaintiffs motion for extension of time to file their briefs on the pending jurisdictional issue. Response to motion to dismiss complaints extended to 6/6/94. Reply to answer briefs due 6/16/94.

06/06/94 37 Stipulations between plaintiffs EEOC and Ms. Walters and defendants Metropolitan Educational Enterprises, Inc. and

Leonard Bieber with attached spreadsheet summaries.

06/06/94 38 Memorandum by plaintiff EEOC in opposition to motion to dismiss complaints.

06/06/94 39 Memorandum of Law by intervenor plaintiff Darlene Walters on the issue of subject matter jurisdiction.

06/06/94 40 Supplemental Stipulations between plaintiff-intervenor Walters and defendants regarding stipulations of fact between Intervenor-Plaintiff Darlene Walters and defendants Metropolitan Educational Enterprises, Inc. and Leonard Bieber.

06/16/94 41 Reply memorandum by defendants in support of their motion to dismiss for lack of subject matter jurisdiction.

08/29/94 43 Memorandum and Order dismissing action.

08/29/94 44 Minute Order of 08/29/94 by Hon. James B. Moran: Enter Memorandum and Order granting defendants' motion to dismiss complaints for lack of subject matter jurisdiction, for the reasons stated,

terminating case.

08/29/94	45	Entered Judgment.
09/22/94	46	Notice of Appeal by intervenor plaintiff Darlene Walters from minute order and judgment entered.
10/27/94	51	Notice of Appeal by plaintiff EEOC
09/12/95	56	Certified Copy of order from the USCA for the Seventh Circuit entered 07/18/95: It is ordered and adjudged Affirming the decision of the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 93 C 2099
Filed August 13, 1993; R. 25

[TITLE OMITTED IN PRINTING]

DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER

Defendants, Metropolitan Educational Enterprises, Inc. and Leonard D. Bieber, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, respectfully move the Court to dismiss the EEOC's Complaint with prejudice. Defendants further move the Court to dismiss the Intervenor-Plaintiff Darlene Walters' First Amended Complaint with prejudice. In support of this motion, Defendants respectfully submit the attached memorandum.

Respectfully submitted,

s/ Patrick J. Falahee, Jr.

Patrick J. Falahee, Jr.
One of The Attorneys For
Defendants Metropolitan
Educational Enterprises, Inc.
and Leonard D. Bieber

Dated: August 13, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 93 C 2099
Filed August 13, 1993; R. 26

[TITLE OMITTED IN PRINTING]

AFFIDAVIT OF LEONARD D. BIEBER IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

[Attached to Defendants' Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction]

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

I, Leonard D. Bieber, being first duly sworn on oath, states:

1. I have personal knowledge of the facts set forth in this affidavit and, if called upon to testify, could competently testify to the facts set forth herein.

2. I am one of the Defendants in this action and reside in Cook County, Illinois.

3. Since 1968, I have been the President of Metropolitan Educational Enterprises, Inc. (hereinafter, "Metropolitan"), one of the Defendants in this action, and am duly authorized to make this affidavit on behalf of Metropolitan.

4. At all times, during the calendar years 1989 and 1990, I was Metropolitan's only salaried employee.

5. At all times during the calendar years 1989 and 1990, all of Metropolitan's other employees were compensated on an hourly basis.

6. I am familiar with the books and records prepared and kept in the regular course of Metropolitan's regularly conducted business activities including its maintenance of each hourly employee's timecards, "payroll worksheets," "payroll registers" and "year-to-date earnings records" (collectively referred to as Metropolitan's "payroll records").

7. During 1989 and 1990, it was a regular practice of Metropolitan to record the number of hours its hourly employees worked on each day they worked by requiring its hourly employees to punch timecards in a time clock which registered the time of day when they reported for work, the time they began and returned from lunch and the time they left.

8. During 1989 and 1990, it was a regular practice of Metropolitan to collect all of its hourly employees'

timecards at the end of each bi-weekly pay period, to tabulate the number of hours each hourly employee recorded on his or her timecard, and to transfer the total number of hours each employee worked during the pay period, together with the total number of hours for any holidays or vacation days for which the employee was entitled to compensation, to a document known as the "payroll worksheet. "

9. During 1989 and 1990, it was a regular business practice of Metropolitan to forward its completed "payroll registers" to an automated payroll service for data processing at the end of each bi-weekly pay period.

10. For each bi-weekly pay period in 1989 and 1990, the payroll service prepared payroll checks for Metropolitan and provided computer-generated reports known as "payroll registers" which reflected each employee's name, hourly wage, number of hours worked, total compensation for vacations or holidays, gross pay and withholding deductions. For each calendar quarter during 1989 and 1990, the payroll service also provided Metropolitan with reports known as the "year-to-date earnings record" which reflected each employee's cumulative gross pay and withholding deductions.

11. The photocopies of Metropolitan's payroll records which were produced in response to item 2 of the Plaintiff's EEOC's First Request For Production of Documents are true and accurate copies of Metropolitan's original payroll records and accurately reflect the days on

which each hourly employee worked or for which he or she was otherwise compensated.

12. The photocopies of Metropolitan's payroll records which were produced in response to item 2 of the Plaintiff EEOC's First Request For Production of Documents contain the names of all individuals employed by Metropolitan at any time during 1989 and 1990.

13. Metropolitan did not employ fifteen or more employees for each working day in twenty or more calendar weeks in 1989.

14. Metropolitan did not employ fifteen or more employees for each working day in twenty or more calendar weeks in 1990.

s/ Leonard D. Bieber
Leonard D. Bieber, Individually
and as President of Metropolitan
Educational Enterprises, Inc.

SUBSCRIBED AND SWORN
to before me this 13th day
of August, 1993.

s/ Lynn M. Nowak
Notary Public

Patrick J. Falahee, Jr.
Timothy M. Nolan
Gleason, McGuire & Shreffler
140 South Dearborn Street, Suite 700
Chicago, Illinois 60603
(312) 641-0580

EXHIBITS

Copy of payroll register follows as Page 13A

[Attached as Exhibit B to Ms. Walter's Motion to Compel Discovery, *etc.*; filed on March 4, 1994; R.31]

METROPOLITAN EDUCATIONAL ENTERPRISES

436-001

PAYROLL REGISTER

PERIOD ENDING 3/08/90
DATE OF CHECK 3/09/90

PAGE 1

L E	EMPL NO	EMPLOYEE NAME	RATE	EARNINGS HOURS REGULAR	OT NO	DT NO	EARNINGS DOLLARS REGULAR	OT NO	DT NO	OTHER	C O	VACATION	FED WH	TAXES FICA	STATE	LOCAL	DED A INSURUS D	DED B ADVANCE	DED C LOAN	DED D GARNISH	DED E	DED F	CHECK NO	NET PAY	✓
D	00001	BIEBER,LEONARD																							
D	00005	BURY,SANDRA L					7000																		
D	00002	CUNNINGHAM,BERNICE					3700																		
D	00009	FINNEY,MARGARET					4025																		
D	00042	HAWLEY,JAMES H					200																		
D	00046	FREEMAN,RONNIE L					7000																		
D	00013	GOMEZ,HAROLD D					6650																		
D	00050	HUNTER SR,A T RAY					7500																		
D	00021	HURDY,ROBERT D					7025																		
D	00003	PALMITER,KATHLEEN					2800																		
D	00044	RENO,REGINA F					7050																		
D	00052	RODRIGUEZ,CHRISTIN					7000																		
D	00047	SMITH,HENRY N					7400																		
D	00051	SWEENEY,LEIGH ANN					7475																		
D	00008	WALTERS,DARLENE					8000																		
		DEPT 00 TOTALS					83325																		
		COMPANY TOTALS					83325																		
		OTHER EARN DIST A					B																		
		STATE BREAKDOWN					10																		

EXHIBIT B

M000067

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Copy of payroll worksheet follows as Page 14A

[Attached as Exhibit B to Ms. Walter's Motion to Compel Discovery, *etc.*; filed on March 4, 1994; R.31]

	472-4520	DP-EMPL REG HRS		HRS OTHER--CODE	$	HRS OTHER--CODE
1	BIEBER,LEONARD D 9/17/87 FD ST	99M99 28 ½ 2 ½	00-0001			
2	BUPY,SANDRA L 9/17/87	01SW1	00-0015	70		
3	CUNNINGHAM,BERNICE 9/17/87 FD ST	99S99 21 ½ 4 ½	00-0012	37		
4	FINNEY,MARGARET 10/27/86	02S02	00-0009	40 ¼		
5	FRAWLEY,JAMES H 8/14/89	01M01	00-0042	7	35	
6	FREEMAN,RONNIE L 10/31/89	01S01	00-0046	70		
7	GOMEZ,HAROLD D 9/17/87	00S0D	00-0013	66 ½		
8	HUNTER SR,A T RAY L 1/03/90	99M99 IN	00-0050	75		
9	MURDY,ROBERT D 1/04/88	01S01	00-0021	70 ¼		
10	PALMITER,KATHLEEN C 9/17/87	01S01	00-0003	28	28	
11	RENO,REGINA F 10/10/89	01S01	00-0044	70 ½	75	
	⇒ RENAME FROM INSUBMAKE					
12	RODRIGUEZ,CHRISTINE 2/12/90	04S04	00-0052	70		
13	SMITH,HENRY N 11/15/89	01S01	00-0047	74		
14	SWEENEY,LEIGH ANN 2/05/90	01S01	00-0051	74 ¾		
15	WALTERS,DARLENE 9/17/87 FD	00S00 10.00	00-0008	80		
16						
17						
18						
19	TOTALS THIS PAGE			633 ¼	63	

M000068

91

EXCERPTS OF DEPOSITION

Excerpts of Deposition of Leonard Bieber [attached to EEOC's Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction] Filed June 6, 1994; R. 38

Direct Examination

BY MR. GOCHANOUR (EEOC Counsel):

[Page 12, lines 7-12]

Q. What does your company do, Metropolitan? A. We sell educational material in the home, encyclopedias, children's books, that sort of thing.

Q. Who sells the products, the books and encyclopedias?
A. Dealers, agents.

* * * *

[Page 13, lines 1, 8-19]

Q. How does Metropolitan make its money? A. How do we make our money?

Q. Yes. A. Through the sale and financing of books.

Q. When you say financing, what do you mean? A. Well, we borrow money against the contract to finance the

commissions and the books, and then when the customer pays us or pays the -- we get our loan taken care of against the paper that we submit on recourse, then we might make money.

Q. Who do you sell your paper to? A. Publishers Credit Service.

* * * *

Q. During 1989 and 1990, did you have any offices other than the one in Chicago? A. No.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 93 C 2099
Filed June 6, 1994; R. 40

[TITLE OMITTED IN PRINTING]

SUPPLEMENTAL STIPULATIONS OF FACT

Intervenor-plaintiff Darlene Walters, on the one hand, and defendants Metropolitan Educational Enterprises, Inc. ("Metropolitan") and Leonard Bieber, one *[sic]* the other hand, hereby enter into these Supplemental Stipulations of Fact:

1. Metropolitan's business is the sale and financing of encyclopedias, dictionaries and other items to retail customers throughout the United States.

2. Metropolitan's sales force is comprised entirely of independent contractors who are known as "dealer's representatives."

3. Those dealer's representatives are not employees of Metropolitan, do not themselves intend to be employees of Metropolitan, and are not intended by Metropolitan to be employees.

4. The dealer's representatives tender sales contracts

to Metropolitan for financing; and Metropolitan can accept or reject such contracts in its sole discretion.

5. The dealer's representatives are not paid for time worked; but only by commission on those sales contracts that Metropolitan accepts.

6. Metropolitan does not control or supervise the dealer's representatives as to their work; the dealer's representatives are free to work when and where they please.

7. Metropolitan does not provide any equipment to the dealer's representatives. Instead, dealer's representatives may choose to purchase demonstration kits and lead cards from Metropolitan or other sources.

8. Metropolitan does not withhold any federal or state taxes from the commissions paid the dealer's representatives; nor does Metropolitan withhold or pay social security taxes for the dealer's representatives.

9. Dealer's representatives do not accumulate retirement benefits from Metropolitan and are not afforded annual leave by Metropolitan.

10. During 1989 and 1990, Metropolitan had at least twenty dealer's representatives.

11. The above stipulations correctly describe the relationship between Metropolitan and the dealer's

representatives during 1989 and 1990.

s/ Constantine John Gekas
One of the attorneys for intervenor-plaintiff Darlene Walters

s/ Patrick J. Falahee, Jr.
One of the attorneys for defendants Metropolitan Educational Enterprises, Inc. and Leonard Bieber

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 93 C 2099
Filed June 6, 1994; R. 37

[TITLE OMITTED IN PRINTING]

STIPULATIONS

1. On April 7, 1993, Plaintiff Equal Employment Opportunity Commission (the "EEOC") filed this action alleging that Defendants Metropolitan Educational Enterprises, Inc. ("Metropolitan") and Leonard Bieber ("Bieber") (Metropolitan and Bieber are collectively referred to as "Defendants") violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII") by discharging Darlene Walters on or about April 23, 1990 in retaliation for her filing of a Title VII Charge of Discrimination.

2. On May 13, 1993 Plaintiff-Intervenor Darlene Walters ("Walters") filed an intervening Complaint alleging, inter alia, the retaliation claim alleged by the EEOC and that Defendants discriminated against Ms. Walters on the basis of her sex, in violation of Title VII, by denying her application for promotion to the position of credit manager and hiring a less qualified male to fill the position.

3. The denial of promotion alleged by Ms. Walters to be discriminatory occurred in or about September 1989.

4. On August 13, 1993, Defendants filed a Motion to Dismiss the Complaints filed by the Plaintiffs, arguing solely that the Court lacks subject matter jurisdiction of this action because Defendants did not employ fifteen (15) or more employees during twenty (20) or more weeks of either 1989 or 1990 as required by Section 701(b) of Title VII, 42 U.S.C. § 2000e-(b) and that the state law pendant claims alleged by Walters should also be dismissed because the Court's jurisdiction of such pendant claims is dependent upon the Court's jurisdiction under Title VII.

5. The charts, attached to these Stipulations as Exhibit A (the "Charts") accurately show, for each calendar week of 1990:

a) the name of each employee on Defendants' payroll for that week and whether such employee was salaried or hourly, and, if hourly, whether full-time or part-time;
b) with respect to each day and each employee, the number of hours, if any, the employee worked (indicated by the number of hours next to the letter "R") or received holiday pay (indicated by the number of hours next to the letter "H"), sick pay (indicated by the number of hours next to the letter "S") or vacation pay (indicated by the number of hours next to the letter "V");
c) with respect to each working day, the total number

of employees who worked on that day and/or received holiday, vacation or sick pay; and
d) the total number of employees (including all salaried and full-time and part-time hourly employees) on Defendants' payroll for the week.

6. For calendar year 1990, the regular workweek for Defendants' business was from 9:00 a.m. to 5:00 p.m. Monday through Friday, excluding holidays (as defined in Paragraph 7, below); Defendants' business was not open on Saturdays or Sundays, and employees were not expected to be at work on Saturdays or Sundays.[1]

7. For calendar year 1990, the following days were holidays on which Defendants' business was not open and employees were not expected to work: January 1, January 2, January 15, February 19, May 28, July 4, September 3, October 8, November 22, November 23, December 25.

8. Each individual identified on any of the Charts was an employee of Defendants for purposes of Section 701(f) of Title VII, 42 U.S.C. § 2000e-(f). Each such individual: a) was supervised and controlled by Defendants with respect to their work; b) was provided by

---

[1]As used herein, "working days" are all weekdays (i.e., Monday through Friday) of calendar year 1990, excluding the holidays listed in Paragraph 7.

Defendants with all necessary equipment and a place to work; c) was compensated for time worked (rather than by job) and was offered benefits such as health insurance; d) performed work which was an integral part of Defendants' business; e) had federal and state income and FICA taxes withheld by Defendants; and f) intended to be, and was intended by Defendants to be, an employee of Defendants.

9. Leonard Bieber, Metropolitan's President and sole shareholder, was a salaried employee and on Defendants' payroll for the entire calendar year 1990.

10. For calendar year 1990, Bernice Cunningham and Margaret Finney were regular part-time employees of Defendants. As regular part-time employees, Ms. Cunningham and Ms. Finney did not work on each working day of each week in 1990, but they were each employed by Defendants and on Defendants' payroll during each week of calendar year 1990.

11. As shown on the Charts, for calendar year 1990, Defendants had fifteen (15) or more employees working (or on paid leave) on each working day of each of the following nine (9) calendar weeks:

Week 1)	January 1 to January 5
Week 2)	February 5 to February 9
Week 3)	August 13 to August 17
Week 4)	October 22 to October 26
Week 5)	October 29 to November 2
Week 6)	November 12 to November 16

Week 7) November 19 to November 23
Week 8) December 3 to December 7
Week 9) December 10 to December 14

and Defendants did not have fifteen (15) or more employees working (or on paid leave) on each working day of the remaining forty-three (43) calendar weeks of calendar year 1990.

12. As shown on the Charts, for calendar year 1990, there were fifteen (15) or more employees on Defendants' payroll during each of the following forty-seven (47) calendar weeks:

Week 1) January 1 to January 5
Week 2) January 8 to January 12
Week 3) January 15 to January 19
Week 4) January 22 to January 26
Week 5) January 29 to February 2
Week 6) February 5 to February 9
Week 7) February 12 to February 16
Week 8) February 19 to February 23
Week 9) February 26 to March 2
Week 10) March 12 to March 16
Week 11) March 19 to March 23
Week 12) April 2 to April 6
Week 13) April 16 to April 20
Week 14) April 23 to April 27
Week 15) April 30 to May 4
Week 16) May 7 to May 11
Week 17) May 14 to May 18

Week 18) May 21 to May 25
Week 19) May 28 to June 1
Week 20) June 4 to June 8
Week 21) June 11 to June 15
Week 22) June 18 to June 22
Week 23) June 25 to June 29
Week 24) July 9 to July 13
Week 25) July 16 to July 20
Week 26) July 23 to July 27
Week 27) July 30 to August 3
Week 28) August 6 to August 10
Week 29) August 13 to August 17
Week 30) August 20 to August 24
Week 31) August 27 to August 31
Week 32) September 10 to September 14
Week 33) September 17 to September 21
Week 34) September 24 to September 28
Week 35) October 1 to October 5
Week 36) October 8 to October 12
Week 37) October 15 to October 19
Week 38) October 22 to October 26
Week 39) October 29 to November 2
Week 40) November 5 to November 9
Week 41) November 12 to November 16
Week 42) November 19 to November 23
Week 43) November 26 to November 30
Week 44) December 3 to December 7
Week 45) December 10 to December 14
Week 46) December 17 to December 21
Week 47) December 24 to December 28

13. Defendants did not have fifteen (15) or more employees working (or on paid leave) on each working day of twenty (20) or more weeks during calendar year 1989.

For Plaintiff Equal Employment Opportunity Commission:

s/ Gregory M. Gochanour
Gregory M. Gochanour
Trial Attorney

Equal Employment Opportunity Commission
500 West Madison Street
Suite 2800
Chicago, IL 60661

For Plaintiff-Intervenor Darlene Walters:

s/ Constantine John Gekas
Constantine Gekas
One of the Attorneys for
Darlene Walters

Harvitt & Gekas, Ltd.
135 South La Salle Street
Suite 2600
Chicago, IL 60603

For Defendants Metropolitan Educational Enterprises, Inc. and Leonard Bieber:

s/ Patrick J. Falahee
Patrick J. Falahee
Attorney for Metropolitan Educational Enterprises, Inc. and Leonard Bieber

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	1	Weekend	Holiday	Holiday	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 31–Dec	Monday 01–Jan	Tuesday 02–Jan	Wednesday 03–Jan	Thursday 04–Jan	Friday 05–Jan	Saturday 06–Jan	Total Hours
1	Bieber, Leonard	1		8.00 H		8.00 R	8.00 R	8.00 R		32.00
2	Bury, Sandra	2		7.00 H		8.00 R	7.00 R	7.00 R		29.00
3	Campbell, Ted	2			2.50 R	7.00 R	7.00 R	7.00 R	3.50 R	27.00
4	Cunningham, Bernice	3					4.00 R		3.45 R	7.45
5	Finney, Margaret	3				3.25 R	3.75 R	3.50 R	6.25 R	16.75
6	Frawley, James	2		7.00 H		7.00 R	7.00 R	7.00 R		28.00
7	Freeman, Ron	2		7.00 H		7.00 R	7.00 R	7.00 R		28.00
8	Garcia, Martha	2				7.00 R	6.75 R	7.00 R		20.75
9	Gomez, Harold	2		7.00 H		7.00 R	7.00 R	7.00 R		28.00
10	Hunter, Aaron	2				3.25 R	4.50 R	4.50 R		12.25
11	Murdy, Robert	2		7.00 H		7.00 R	6.75 R	7.00 R		27.75
12	Palmiter, Kathleen	2		7.00 H		7.00 R	7.00 R	7.00 R		28.00
13	Reno, Regina	2		7.00 H		7.00 R	7.00 R	7.00 R		28.00
14	Smith, Henry	2				6.75 R	6.75 R	7.00 R		20.50
15	Tucker, Betty	2				7.00 R	7.00 R	7.00 R		21.00
16	Walters, Darlene	2		7.00 H	5.00 R	1.00 R		8.00 R	5.25 R	26.25
17										0.00
18										0.00
19										0.00
20										0.00

Employees in each employee type:

1 Salaried: Type 1
13 Full–time: Type 2
2 Part–time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily: 15 15 15

Number of Employees on Weekly Payroll – – 16

week1.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	2	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 07–Jan	Monday 08–Jan	Tuesday 09–Jan	Wednesday 10–Jan	Thursday 11–Jan	Friday 12–Jan	Saturday 13–Jan	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40.00
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35.00
3	Campbell, Ted	2		5.50 R	6.75 R	6.75 R	7.00 R	7.00 R		33.00
4	Cunningham, Bernice	3		6.25 R		6.25 R	6.00 R	6.00 R		24.50
5	Finney, Margaret	3		3.75 R		3.75 R	3.00 R	2.50 R		13.00
6	Frawley, James	2		7.00 R	7.00 R	7.00 R	7.00 R	6.25 R		34.25
7	[illegible]an, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35.00
8	Garcia, Martha	2		6.75 R	7.00 R	5.75 R	7.00 R	7.00 R		33.50
9	Gomez, Harold	2		7.00 R	6.75 R	8.25 R	7.00 R	7.00 R		36.00
10	Hunter, Aaron	2		4.25 R	11.50 R	11.75 R	8.25 R	7.75 R		43.50
11	Murdy, Robert	2		6.25 R	7.00 R	7.00 R	5.50 R			25.75
12	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35.00
13	Reno, Regina	2		7.50 R	7.00 R	7.00 R	7.00 R	6.50 R		35.00
14	Smith, Henry	2		5.50 R	7.00 R	7.00 R	7.00 R	7.00 R		33.50
15	Tucker, Betty	2		7.00 R	6.75 R	7.00 R	7.00 R	7.00 R		34.75
16	Walters, Darlene	2		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R	4.25 R	44.25
17										0.00
18										0.00
19										0.00
20										0.00

Employees in each employee type:

1 Salaried: Type 1
13 Full–time: Type 2
2 Part–time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	16	14	16	16	15

Number of Employees on Weekly Payroll – – 16

week2.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	3	Weekend	Holiday	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 14–Jan	Monday 15–Jan	Tuesday 16–Jan	Wednesday 17–Jan	Thursday 18–Jan	Friday 19–Jan	Saturday 20–Jan	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Campbell, Ted	2				7.00 R				7
4	Cunningham, Bernice	3			6.00 R	5.00 R	6.00 R	5.00 R		22
5	Finney, Margaret	3		2.75 R	3.50 R	3.00 R	3.00 R			12.25
6	Frawley, James	2		7.00 H	7.00 R	7.00 R		7.00 R		28
7	Freeman, Ron	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Garcia, Martha	2			7.00 R	7.00 R	7.00 R	6.75 R		27.75
9	Gomez, Harold	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Hunter, Aaron	2		7.00 H	12.00 R	7.75 R	7.75 R	7.75 R		42.25
11	Murdy, Robert	2			7.00 R	7.00 R	7.00 R	7.00 R		28
12	Palmiter, Kathleen	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2		7.00 H	7.00 R	7.00 R	6.75 R	7.00 R		34.75
14	Smith, Henry	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Tucker, Betty	2			7.00 R	7.00 R	6.75 R			20.75
16	Walters, Darlene	2		7.00 H	8.00 R	8.00 R	8.00 R	8.00 R		39
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
13 Full–time: Type 2
2 Part–time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:		15	16	14	13

Number of Employees on Weekly Payroll – – 16

week3.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	4	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 21–Jan	Monday 22–Jan	Tuesday 23–Jan	Wednesday 24–Jan	Thursday 25–Jan	Friday 26–Jan	Saturday 27–Jan	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.75 R	5.50 R		5.50 R	4.25 R		21
4	Finney, Margaret	3		3.50 R	3.50 R	3.50 R		2.75 R	7.50 R	20.75
5	Frawley, James	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
6	Freeman, Ron	2		1.00 R	8.00 R	8.00 R	8.00 R	7.00 R		32
7	Garcia, Martha	2		7.00 R	6.75 R	6.75 R	7.00 R	6.75 R		34.25
8	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Hunter, Aaron	2		7.75 R	7.75 R	7.75 R	7.00 R	7.75 R		38
10	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Palmiter, Kathleen	2		7.00 S	7.00 S	7.00 R	7.00 R	7.00 R		35
12	Reno, Regina	2		6.75 R	7.00 R	8.00 R	6.75 R	7.00 R		35.5
13	Smith, Henry	2		7.00 R	7.00 R	6.25 R	6.75 R	6.75 R		33.75
14	Tucker, Betty	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Walters, Darlene	2		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R	5.00 R	45
16										0
17										0
18										0
19										0
20										

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	15	15	14	14	15

Number of Employees on Weekly Payroll – – 15

week4.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	5	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 28–Jan	Monday 29–Jan	Tuesday 30–Jan	Wednesday 31–Jan	Thursday 01–Feb	Friday 02–Feb	Saturday 03–Feb	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3				5.00 R	5.50 R			10.5
4	Finney, Margaret	3		3.50 R		3.75 R	3.75 R	2.75 R	5.5 R	19.25
5	Frawley, James	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
6	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Garcia, Martha	2		7.00 R	7.00 R	7.00 R	7.00 R	6.75 R		34.75
8	Gomez, Harold	2		5.50 R	7.00 R		7.00 R	7.00 R		26.5
9	Hunter, Aaron	2		6.75 R	8.00 R	7.75 R	11.75 R			34.25
10	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Reno, Regina	2		7.00 R	7.00 R	7.00 R	6.75 R	7.00 R		34.75
13	Smith, Henry	2		7.00 R	7.00 R		7.00 R	7.00 R		28
14	Tucker, Betty	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Walters, Darlene	2		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
16										
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:

R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	14	13	13	15	13

Number of Employees on Weekly Payroll – – 15

week5.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	6	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 04–Feb	Monday 05–Feb	Tuesday 06–Feb	Wednesday 07–Feb	Thursday 08–Feb	Friday 09–Feb	Saturday 10–Feb	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.00 R	5.50 R	6.00 R	5.50 R	5.25 R		28.25
4	Finney, Margaret	3		3.50 R	3.75 R	3.75 R		2.50 R		13.5
5	Frawley, James	2		6.50 R	6.25 R	3.00 R	7.00 R	7.00 R		29.75
6	Freeman, Ron	2		7.00 R	6.50 R	7.00 R	7.00 R	7.00 R		34.5
7	Garcia, Martha	2		7.00 R	6.75 R	7.00 R	7.00 R	7.00 R		34.75
8	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Hunter, Aaron	2		11.50 R	11.75 R	11.75 R	7.75 R	12.00 R		54.75
10	Murdy, Robert	2		7.00 R	6.75 R	6.75 R	7.00 R	7.00 R		34.5
11	Palmiter, Kathleen	2		8.00 R	7.00 R	7.00 R	6.50 R	7.00 R		35.5
12	Reno, Regina	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Sweeney, Leigh Ann	2		2.25 R	7.00 R	7.00 R	7.00 R	7.00 R		30.25
15	Tucker, Betty	2		7.90 R	7.00 R	7.00 R	7.00 R	5.00 R		33
16	Walters, Darlene	2	4.5 R	8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		44.5
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
13 Full–time: Type 2
2 Part–time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	16	16	16	15	16

Number of Employees on Weekly Payroll – – 16

week6 wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	7	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 11–Feb	Monday 12–Feb	Tuesday 13–Feb	Wednesday 14–Feb	Thursday 15–Feb	Friday 16–Feb	Saturday 17–Feb	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3			5.50 R					5.5
4	Finney, Margaret	3		3.75 R	3.25 R			3.00 R	8 R	18
5	Frawley, James	2		7.00 R	7.00 R	7.00 R	5.50 R	7.00 R		33.5
6	Freeman, Ron	2		7.00 R	7.00 S	7.00 R	7.00 R	7.00 R		35
7	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Hunter, Aaron	2		7.50 R	7.25 R		7.00 R	7.00 R		28.75
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Reno, Regina	2			8.00 R	7.00 R	7.00 R	7.00 R		29
12	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Smith, Henry	2		6.75 R	7.00 R	7.00 R	7.00 R	7.00 R		34.75
14	Sweeney, Leigh	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Walters, Darlene	2		8.00 R	8.00 R	7.00 V	7.00 V	7.00 V		37
16										0
17										0
18										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	13	15	12	13	14

Number of Employees on Weekly Payroll – – 15

week7.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	8	Weekend	Holiday	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 18–Feb	Monday 19–Feb	Tuesday 20–Feb	Wednesday 21–Feb	Thursday 22–Feb	Friday 23–Feb	Saturday 24–Feb	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3			5.50 R		5.75 R			11.25
4	Finney, Margaret	3		3.75 R	3.25 R	3.50 R			7.00 R	17.5
5	Frawley, James	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
6	Freeman, Ron	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Gomez, Harold	2		7.00 H	7.00 R	7.00 R	7.00 R	6.75 R		34.75
8	Hunter, Aaron	2		7.00 H	12.00 R	11.75 R	7.25 R	3.50 R		41.5
9	Murdy, Robert	2		7.00 H	6.50 R	7.00 R	7.00 R	7.00 R		34.5
10	Palmiter, Kathleen	2		7.00 H	7.00 V	7.00 V	7.00 V	7.00 R		35
11	Reno, Regina	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Rodriguez, Christine	2			7.00 R	7.00 R	7.00 R	7.00 R		28
13	Smith, Henry	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Sweeney, Leigh	2			7.00 R	7.00 R	7.00 R	7.00 R		28
15	Walters, Darlene	2		7.00 H	8.00 R	7.00 V	7.00 V	8.00 R		37
16										0
17										0
18										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:

R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:		15	14	14	13	

Number of Employees on Weekly Payroll – – 15

week8.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	9	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 25–Feb**	**Monday 26–Feb**	**Tuesday 27–Feb**	**Wednesday 28–Feb**	**Thursday 01–Mar**	**Friday 02–Mar**	**Saturday 03–Mar**	**Total Hours**
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.75 R	5.50 R		6.00 R	4.50 R		21.75
4	Finney, Margaret	3		3.00 R	3.25 R	3.50 R	3.50 R	3.25 R	**6.25 R**	22.75
5	Frawley, James	2		7.00 V	7.00 V	7.00 V	7.00 V	7.00 V		35
6	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	**4.00 R**	39
7	Gomez, Harold	2		7.00 S	7.00 R	7.00 R	7.00 R	7.00 R	**4.25 R**	39.25
8	Hunter, Aaron	2		7.75 R	7.75 R	11.75 R	7.50 R	5.25 R	**3.25 R**	43.25
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Palmiter, Kathleen	2		7.00 V	7.00 V	7.00 V	7.00 S	7.00 S		35
11	Reno, Regina	2		6.55 R	7.00 R	7.00 R	7.00 R	6.00 R	**4.00 R**	37.55
12	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	**4.00 R**	39
14	Sweeney, Leigh	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	**5.00 R**	40
15	Walters, Darlene	2		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R	**4.50 R**	44.5
16										0
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily: 15 | 15 | 14 | 15 | 15

Number of Employees on Weekly Payroll – – 15

week9.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	10	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 04–Mar	Monday 05–Mar	Tuesday 06–Mar	Wednesday 07–Mar	Thursday 08–Mar	Friday 09–Mar	Saturday 10–Mar	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.75 R	5.00 R		5.00 R	5.50 R		21.25
4	Finney, Margaret	3		3.50 R	4.00 R	4.00 R		3.50 R	9.00 R	24
5	Freeman, Ron	2		7.00 R	4.00 R	7.00 R	7.00 R	7.00 R		32
6	Gomez, Harold	2		7.00 R	7.00 R	6.50 R	7.00 R	7.00 R	3.00 R	37.5
7	Hunter, Aaron	2			9.25 R	11.75 R	7.50 R	7.00 R		35.5
8	Murdy, Robert	2		7.25 R	7.00 R	7.00 R	7.00 R	7.00 R		35.25
9	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Reno, Regina	2		5.25 R	7.00 R	7.00 R	6.75 R	7.00 R		33
11	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Sweeney, Leigh	2		7.00 R	6.75 R	7.00 R	7.00 R	7.00 R		34.75
14	Walters, Darlene	2		8.00 R	8.00 R	8.00 R	8.00 R	5.50 R		37.5
15										0
16										0
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
11 Full–time: Type 2
2 Part–time: Type 3
0 Other
14 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	13	14	13	13	14

Number of Employees on Weekly Payroll – – **14**

week10.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	11	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 11–Mar	Monday 12–Mar	Tuesday 13–Mar	Wednesday 14–Mar	Thursday 15–Mar	Friday 16–Mar	Saturday 17–Mar	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.75 R			5.75 R			11.5
4	Finney, Margaret	3		3.50 R	3.50 R	3.50 R	3.00 R		9.50 R	23
5	Frawley, James	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
6	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R			28
7	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	6.75 R	7.00 R		34.75
8	Hunter, Aaron	2		6.75 R	6.75 R	7.00 R	7.00 R	7.00 R	6.25 R	40.75
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Reno, Regina	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	5.00 R	40
13	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	3.75 R	38.75
14	Sweeney, Leigh	2		6.75 R	7.00 R	7.00 R	7.00 R	7.00 R		34.75
15	Walters, Darlene	2		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R	4.75 R	44.75
16										0
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	15	14	14	15	12

Number of Employees on Weekly Payroll – – 15

week11.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	12	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 18 – Mar**	**Monday 19 – Mar**	**Tuesday 20 – Mar**	**Wednesday 21 – Mar**	**Thursday 22 – Mar**	**Friday 23 – Mar**	**Saturday 24 – Mar**	**Total Hours**
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 S	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.00 R			5.25 R	4.75 R		16
4	Finney, Margaret	3		3.00 R		4.00 R		3.75 R		10.75
5	Frawley, James	2		5.00 R	7.00 R					12
6	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	6.25 R	6.50 R		33.75
8	Hunter, Aaron	2		7.00 R	11.00 R	10.75 R	7.00 R	7.00 R		42.75
9	Murdy, Robert	2			7.00 R	7.00 R	7.00 R	7.00 R		28
10	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 S	7.00 R		35
11	Reno, Regina	2		7.00 R	7.00 R	7.00 R	7.00 R	6.75 R		34.75
12	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Sweeney, Leigh	2		7.00 R	7.00 R		7.00 R	3.25 R		24.25
15	Walters, Darlene	2		8.00 R	8.00 R	7.00 S	8.00 R	7.00 R		38
16										0
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full-time: Type 2
2 Part-time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	14	13	12	13	14

Number of Employees on Weekly Payroll – – 15

week12.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	13	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 25–Mar	Monday 26–Mar	Tuesday 27–Mar	Wednesday 28–Mar	Thursday 29–Mar	Friday 30–Mar	Saturday 31–Mar	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3								0
4	Finney, Margaret	3			3.50 R	3.00 R	3.25 R	2.50 R	9.5 R	21.75
5	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	3.5 R	38.5
6	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Gomez, Harold	2		7.00 V	7.00 V	7.00 V	7.00 V	7.00 V		35
8	Hunter, Aaron	2		6.75 R	6.50 R	6.75 R	7.00 R	7.00 R		34
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Reno, Regina	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Rodriguez, Christine	2		5.25 R	7.00 R		7.00 R	7.00 R		26.25
13	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Walters, Darlene	2		7.00 R	7.00 R	8.00 R	8.00 R	8.00 R		38
15										0
16										0
17										0
18										0
	Employees in each employee type:									
	1 Salaried: Type 1									
	13 Full–time: Type 2									
	2 Part–time: Type 3									
	0 Other									
	16 Total Employees									
	Number of Employees Working Daily:			12	13	12	13	13		

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees on Weekly Payroll – – 14

week13.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	14	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 01-Apr	Monday 02-Apr	Tuesday 03-Apr	Wednesday 04-Apr	Thursday 05-Apr	Friday 06-Apr	Saturday 07-Apr	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.00 R	6.00 R		5.50 R	6.00 R	4.50 R	28
4	Finney, Margaret	3		3.00 R	3.50 R	3.75 R				10.25
5	Frawley, James	2		4.00 R						4
6	Freeman, Ron	2		7.00 R	7.00 R		7.00 R	7.00 R		28
7	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Hunter, Aaron	2		7.00 R	11.00 R	11.00 R	6.75 R	6.75 R		42.5
10	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	6.75 R	6.50 R		34.25
12	Reno, Regina	2		7.00 R		7.00 R	7.00 R	7.00 R		28
13	Rodriguez, Christine	2		7.00 R	7.00 R	8.00 R	7.00 R	7.00 R		36
14	Smith, Henry	2		5.75 R	6.75 R	7.00 R	7.00 R	7.00 R		33.5
15	Walters, Darlene	2		8.00 R	8.00 R	8.00 R	8.00 R		3.75 R	35.75
16										0
17										0
18										0
19										0
	Employees in each employee type:									Hourly Descriptions:
	1 Salaried: Type 1									R - Regular Pay
	12 Full-time: Type 2									H - Holiday pay
	2 Part-time: Type 3									V - Vacation Pay
	0 Other									S - Sick Pay
	15 Total Employees									
	Number of Employees Working Daily:			15	13	12	13	12		

Number of Employees on Weekly Payroll -- 15

week14.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	15	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 08-Apr	Monday 09-Apr	Tuesday 10-Apr	Wednesday 11-Apr	Thursday 12-Apr	Friday 13-Apr	Saturday 14-Apr	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.00 R	6.00 R	6.00 R		5.00 R		23
4	Finney, Margaret	3			4.00 R	3.00 R	3.50 R	2.50 R	4.75 R	17.75
5	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	3.00 R	38
6	Gomez, Harold	2			7.00 R	7.00 R	7.00 R	7.00 R		28
7	Hunter, Aaron	2		7.00 R	7.00 R	6.75 R	4.50 R	7.00 R	3.00 R	35.25
8	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Murdy, Robert	2		6.75 R	7.00 R	6.50 R	7.75 R	7.00 R		35
10	Palmiter, Kathleen	2		6.75 R	7.00 R	6.75 R	7.50 R	7.00 R		35
11	Reno, Regina	2		7.00 R		6.75 R	7.00 R	7.00 R		27.75
12	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Smith, Henry	2		7.00 S	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Walters, Darlene	2		8.00 R	6.00 R			6.75 R		20.75
15										0
16										0
17										0
18										0

Employees in each employee type:

1 Salaried: Type 1
11 Full-time: Type 2
2 Part-time: Type 3
0 Other
14 Total Employees

Hourly Descriptions:

R - Regular Pay
H - Holiday Pay
V - Vacation Pay
S - Sick Pay

Number of Employees Working Daily:	12	13	13	12	14

Number of Employees on Weekly Payroll -- 14

week15.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	16	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 15–Apr**	**Monday 16–Apr**	**Tuesday 17–Apr**	**Wednesday 18–Apr**	**Thursday 19–Apr**	**Friday 20–Apr**	**Saturday 21–Apr**	**Total Hours**
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3					6.00 R	5.50 R		11.5
4	Finney, Margaret	3			3.75 R	3.75 R	2.50 R		5.00 R	15
5	Freeman, Ron	2		7.00 R	8.00 R	8.00 R	7.00 R	7.00 R		37
6	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Hunter, Aaron	2		7.00 R	11.00 R	11.00 R	7.00 R	7.00 R		43
8	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Palmiter, Kathleen	2		5.25 R	7.00 R	7.00 R	7.00 R	7.00 R		33.25
11	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Reno, Regina	2		7.00 R	7.00 R	6.75 R	6.50 R	7.00 R		34.25
13	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Walters, Darlene	2		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
16										0
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	13	14	14	15	14

Number of Employees on Weekly Payroll – – 15

week16.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	17	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 22-Apr	Monday 23-Apr	Tuesday 24-Apr	Wednesday 25-Apr	Thursday 26-Apr	Friday 27-Apr	Saturday 28-Apr	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.25 R		6.00 R	5.25 R			17.5
4	Davis, Shyanne	2					2.50 R	7.00 R		9.5
5	Finney, Margaret	3		2.75 R	2.75 R	2.50 R		2.50 R		10.5
6	Freeman, Ron	2		7.00 R	7.00 R		7.00 R	7.00 R	4 R	32
7	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Hunter, Aaron	2		7.00 R		7.00 R	7.00 R	7.00 R		28
9	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Murdy, Robert	2			7.00 R	7.00 R	7.00 R	7.00 R		28
11	Palmiter, Kathleen	2		7.00 R						7
12	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2		6.25 R	7.00 R	7.00 R	6.00 R	7.00 R		33.25
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16	Walters, Darlene	2		4.75 R						4.75
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
13 Full-time: Type 2
2 Part-time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R - Regular Pay
H - Holiday Pay
V - Vacation Pay
S - Sick Pay

Number of Employees Working Daily:	14	11	12	13	13

Number of Employees on Weekly Payroll -- 16

week17.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	18	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 29–Apr	Monday 30 – Apr	Tuesday 01 – May	Wednesday 02 – May	Thursday 03 – May	Friday 04 – May	Saturday 05 – May	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 V	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.50 R	5.75 R		5.00 R	5.50 R		21.75
4	Davis, Shyanne	2		7.00 R	7.00 R	7.00 R	7.00 R	5.00 R		33
5	Finney, Margaret	3	8.25 R	3.25 R	3.75 R	3.75 R	2.00 R	2.00 R	7.00 R	30
6	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Hunter, Aaron	2		10.75 R	11.00 R	11.00 R	7.00 R	7.00 R		46.75
9	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Murdy, Robert.	2		7.00 R	7.00 R	6.50 R	7.00 R	7.00 R		34.5
11	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2		7.00 R	7.00 R	6.50 R	7.00 R	2.50 R		30
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Smith, Henry	2		7.00 R	7.00 R	7.00 R		7.00 R		28
16										0
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	15	15	14	14	15

Number of Employees on Weekly Payroll – – 15

week18.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	19	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 06–May	Monday 07–May	Tuesday 08–May	Wednesday 09–May	Thursday 10–May	Friday 11–May	Saturday 12–May	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.00 R		6.25 R	6.00 R	6.00 R		24.25
4	Davis, Shyanne	2			7.00 R	7.00 R	7.00 R	7.00 R		28
5	Finney, Margaret	3		2.75 R	3.50 R		2.00 R	2.00 R	9 R	19.25
6	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	4.00 R	7.00 R		32
7	Gomez, Harold	2		6.75 R	7.00 R	7.00 R	7.00 R	7.00 R		34.75
8	Hunter, Aaron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	4 R	39
9	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2			6.75 R	7.00 R	6.50 R	7.00 R		27.25
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Smith, Henry	2		7.00 R	7.00 R	6.75 R	7.00 R	7.00 R		34.75
16										0
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	**13**	**14**	**14**	**15**	**15**

Number of Employees on Weekly Payroll – – **15**

week19.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	20	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 13–May	Monday 14 – May	Tuesday 15 – May	Wednesday 16 – May	Thursday 17 – May	Friday 18 – May	Saturday 19–May	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.75 R	5.50 R		5.50 R	5.00 R		21.75
4	Davis, Shyanne	2		7.00 R	5.00 R	7.00 R	7.00 R	7.00 R	4.25 R	37.25
5	Finney, Margaret	3		3.75 R	3.75 R	3.75 R	2.25 R	2.00 R	8.00 R	23.5
6	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	5.50 R		33.5
7	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	3.50 R		31.5
8	Hunter, Aaron	2		6.50 R	9.50 R	11.00 R	7.00 R	6.75 R		40.75
9	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2		7.00 R	6.75 R	7.00 R	7.00 R	7.00 R		34.75
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 S	7.00 R	7.00 R		35
15	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16										0
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	15	15	14	15	15

Number of Employees on Weekly Payroll – – 15

week20.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	21	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 20–May**	**Monday 21–May**	**Tuesday 22–May**	**Wednesday 23–May**	**Thursday 24–May**	**Friday 25–May**	**Saturday 26–May**	**Total Hours**
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.75 R						5.75
4	Davis, Shyanne	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	**3.00 R**	38
5	Finney, Margaret	3		3.25 R	2.50 R	2.50 R	2.50 R	2.25 R	**8.00 R**	21
6	Freeman, Ron	2			7.00 R	7.00 R	7.00 R	7.00 R	**4.00 R**	32
7	Gomez, Harold	2		7.00 R	7.00 R	5.50 R	7.00 R	7.00 R		33.5
8	Hunter, Aaron	2		7.75 R	6.75 R		0.50 R	7.00 R		22
9	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 V		35
11	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2		7.00 R	7.00 R	7.00 R	7.00 R	6.25 R		34.25
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	**4.25 R**	39.25
16										0
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	**14**	**14**	**13**	**14**	**14**

Number of Employees on Weekly Payroll – – **15**

week21.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	22	Weekend	Holiday	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 27–May	Monday 28–May	Tuesday 29–May	Wednesday 30–May	Thursday 31–May	Friday 01–Jun	Saturday 02–Jun	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3			5.25 R	5.50 R	5.00 R	5.50 R		21.25
4	Davis, Shyanne	2		7.00 H	7.00 R	7.00 R		7.00 R		28
5	Finney, Margaret	3			4.00 R	3.75 R	3.00 R			10.75
6	Freeman, Ron	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R	4.50 R	39.5
7	Gomez, Harold	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Hunter, Aaron	2		7.00 H	11.00 R	11.00 R	7.00 R	5.50 R	7.50 R	49
9	Lindley, Linda	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Murdy, Robert	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Palmiter, Kathleen	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Paul, Mary	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2			7.00 R	7.00 R	7.00 R	7.00 R		28
14	Rodriguez, Christine	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Smith, Henry	2		7.00 H	6.00 R	7.00 R	7.00 R	7.00 R	4.00 R	38
16										0
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily: 15 15 14 14

Number of Employees on Weekly Payroll – – 15

week22.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	23	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 03–Jun	Monday 04–Jun	Tuesday 05–Jun	Wednesday 06–Jun	Thursday 07–Jun	Friday 08–Jun	Saturday 09–Jun	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.00 R	5.75 R		6.00 R			17.75
4	Davis, Shyanne	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
5	Finney, Margaret	3			3.50 R	3.50 R	3.50 R	3.25 R	8.5 R	22.25
6	Freeman, Ron	2		5.00 R	7.00 R	7.00 R	7.00 R	7.00 R	4.0 R	37
7	Gomez, Harold	2		5.50 R	7.00 R	7.00 R		7.00 R		26.5
8	Hunter, Aaron	2		3.75 R		10.25 R	7.00 R			21
9	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Murdy, Robert	2		6.25 R	7.00 R	7.00 R	6.75 R	6.75 R		33.75
11	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 S	6.75 R	7.00 R		34.75
12	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	4.0 R	39
16										0
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily: 14 14 14 14 13

Number of Employees on Weekly Payroll – – 15

week23.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	24	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 10–Jun	Monday 11–Jun	Tuesday 12–Jun	Wednesday 13–Jun	Thursday 14–Jun	Friday 15–Jun	Saturday 16–Jun	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.50 R	5.75 R		5.50 R	6.00 R		23.75
4	Finney, Margaret	3		3.50 R	3.75 R	3.50 R		2.75 R	8.25 R	21.75
5	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
6	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Hunter, Aaron	2		11.00 R	8.50 R	11.00 R	7.00 R	6.75 R		44.25
8	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Paul, Mary	2		7.00 R	6.25 R	7.00 R	7.00 R	7.00 R		34.25
12	Reno, Regina	2		7.00 R	6.25 R	7.00 R	7.00 R	7.00 R		34.25
13	Rodriguez, Christine	2		7.00 R	7.00 R	6.75 R	7.00 R	7.00 R		34.75
14	Sallee, Wayne	2						4.25 R		4.25
15	Smith, Henry	2		6.75 R	7.00 R	7.00 R	7.00 R	7.00 R		34.75
16										0
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily: 14 | 14 | 13 | 13 | 15

Number of Employees on Weekly Payroll – – 15

week24.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	25	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 17–Jun	Monday 18–Jun	Tuesday 19–Jun	Wednesday 20–Jun	Thursday 21–Jun	Friday 22–Jun	Saturday 23–Jun	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.75 R			6.00 R			11.75
4	Davis, Shyanne	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
5	Finney, Margaret	3		3.00 R	3.75 R	3.00 R	3.75 R	2.50 R	8.25 R	24.25
6	Freeman, Ron	2		7.00 V	7.00 V	7.00 V	7.00 V	7.00 V		35
7	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Hunter, Aaron	2			9.00 R	6.00 R	11.00 R	3.25 R		29.25
9	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Palmiter, Kathleen	2		7.00 S	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2		7.00 R	7.00 R		7.00 R	7.00 R		28
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Sallee, Wayne	2			6.00 R	7.00 R	6.50 R	7.00 R		26.5
16	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
13 Full–time: Type 2
2 Part–time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	14	15	14	16	15

Number of Employees on Weekly Payroll – – 16

week25.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	26	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 24–Jun**	**Monday 25–Jun**	**Tuesday 26–Jun**	**Wednesday 27–Jun**	**Thursday 28–Jun**	**Friday 29–Jun**	**Saturday 30–Jun**	**Total Hours**
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.50 R	5.50 R		5.50 R	6.50 R		23
4	Finney, Margaret	3		3.50 R	3.75 R	3.75 R	2.75 R	2.75 R	**7.25 R**	23.75
5	Freeman, Ron	2		7.00 R	6.50 R	7.00 R	7.00 R	7.00 R	**4.25 R**	38.75
6	Gomez, Harold	2			6.50 R	7.00 R	7.00 R	7.00 R		27.5
7	Hunter, Aaron	2			9.25 R	11.00 R	7.00 R		**6.75 R**	34
8	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Murdy, Robert	2		6.75 R	7.00 R	5.00 R	7.00 R	7.00 R		32.75
10	Palmiter, Kathleen	2		6.75 R	7.00 R	7.00 R				20.75
11	Paul, Mary	2		7.00 R		7.00 R	7.00 R	7.00 R		28
12	Reno, Regina	2		7.00 V	7.00 V	7.00 V	7.00 V	7.00 R		35
13	Rodriguez, Christine	2		7.00 R	7.00 R		7.00 R	7.00 R		28
14	Sallee, Wayne	2		7.00 R	5.50 R			6.00 R		18.5
15	Smith, Henry	2		7.00 R	7.00 R	6.75 R	7.00 R	7.00 R		34.75
16										0
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	**13**	**14**	**12**	**13**	**13**

Number of Employees on Weekly Payroll – – 15

week26.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	27	Weekend	Working Day	Working Day	Holiday	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 01–Jul**	**Monday 02–Jul**	**Tuesday 03–Jul**	**Wednesday 04–Jul**	**Thursday 05–Jul**	**Friday 06–Jul**	**Saturday 07–Jul**	**Total Hours**
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 H	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.75 R	5.00 R		6.00 R	6.00 R		23.75
4	Finney, Margaret	3		3.50 R			3.75 R	3.00 R	8 R	18.25
5	Freeman, Ron	2		7.00 R	7.00 R	7.00 H	7.00 R	7.00 R	4 R	39
6	Gomez, Harold	2		7.00 R	5.00 R	7.00 H	7.00 R	7.00 R		33
7	Lindley, Linda	2		7.00 R	7.00 R	7.00 H	7.00 R	7.00 R		35
8	Murdy, Robert	2		7.00 R	7.00 R	7.00 H	7.00 R	7.00 R		35
9	Palmiter, Kathleen	2		7.00 R		7.00 H				14
10	Paul, Mary	2		7.00 R	7.00 R	7.00 H	7.00 R	7.00 R		35
11	Reno, Regina	2		7.00 R	7.00 R	7.00 H	7.00 R	7.00 R		35
12	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 H	7.00 R	7.00 R		35
13	Smith, Henry	2		7.00 R	7.00 R	7.00 H	7.00 R	7.00 R		35
14										0
15										0
16										0

Employees in each employee type:

1 Salaried: Type 1
10 Full–time: Type 2
2 Part–time: Type 3
0 Other
13 Total Employees

Hourly Descriptions:

R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	**13**	**11**		**12**	**12**	

Number of Employees on Weekly Payroll – – **13**

week27.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	28	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 08–Jul**	**Monday 09–Jul**	**Tuesday 10–Jul**	**Wednesday 11–Jul**	**Thursday 12–Jul**	**Friday 13–Jul**	**Saturday 14–Jul**	**Total Hours**
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.00 R	5.75 R		6.00 R	5.50 R		23.25
4	Finney, Margaret	3		3.50 R	3.50 R	3.25 R	2.25 R	2.00 R	8.25 R	22.75
5	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R			28
6	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	6.25 R		34.25
9	Palmiter, Kathleen	2		7.00 R		7.00 R	7.00 R	7.00 R		28
10	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Reno, Regina	2		7.00 R	6.75 R	5.75 R	6.75 R	7.00 R		33.25
13	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Smith, Henry	2		7.00 V	7.00 V	7.00 V	7.00 V	7.00 R		35
15	Wilds, Joseph	2		7.00 R	7.00 R	7.00 R		7.00 R		28
16										0
17										0
18										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Number of Employees Working Daily: 15 | 14 | 14 | 14 | 14

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees on Weekly Payroll – – 15

week28.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No. 29		Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 15–Jul	Monday 16–Jul	Tuesday 17–Jul	Wednesday 18–Jul	Thursday 19–Jul	Friday 20–Jul	Saturday 21–Jul	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.75 R	5.50 R	5.50 R		5.50 R		22.25
4	Finney, Margaret	3		2.25 R	2.25 R	2.00 R	2.00 R	2.25 R	5.0 R	15.75
5	Freeman, Ron	2		5.00 R	6.75 R	7.00 R	7.00 R	7.00 R		32.75
6	Gomez, Harold	2		7.00 V	7.00 V	7.00 V	7.00 V	7.00 V		35
7	Hunter, Aaron	2								0
8	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	6.00 R	7.00 R		34
10	Palmiter, Kathleen	2		7.00 R	7.00 R		6.75 R	7.00 R		27.75
11	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	5.75 R		33.75
13	Reno, Regina	2		7.00 R	7.00 R	6.75 R	7.00 R	7.00 R		34.75
14	Rodriguez, Christine	2			8.00 R	8.00 R	7.00 R	8.00 R		31
15	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16	Thome–Steiner, Lisbet	2								0
17	Wilds, Joseph	2		7.00 R	7.00 R	7.00 R	5.25 R			26.25
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
14 Full–time: Type 2
2 Part–time: Type 3
0 Other
17 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	**14**	**15**	**14**	**14**	**14**

Number of Employees on Weekly Payroll – – 17

week29.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	30	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 22–Jul	Monday 23–Jul	Tuesday 24–Jul	Wednesday 25–Jul	Thursday 26–Jul	Friday 27–Jul	Saturday 28–Jul	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.00 R			5.25 R	5.00 R		16.25
4	Finney, Margaret	3		3.50 R	2.25 R	2.25 R	5.25 R	2.00 R	9.00 R	24.25
5	Freeman, Ron	2			7.00 R	7.00 R	7.00 R	7.00 R		28
6	Gomez, Harold	2		7.00 R	6.75 R	6.75 R	7.00 R	7.00 R		34.5
7	Hunter, Aaron	2								0
8	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	6.75 R		34.75
10	Palmiter, Kathleen	2						7.00 R		7
11	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2			7.00 R	7.00 R	6.50 R	7.00 R		27.5
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	6.00 R		34
16	Thome–Steiner, Lisbet	2		7.00 R	6.75 R	7.00 R	7.00 R	7.00 R		34.75
17	Wilds, Joseph	2		7.00 R	6.75 R	7.00 R	7.00 R	7.00 R		34.75
18										0
19										0
20										0
	Number of Employees Working Daily:			13	14	14	15	16		

Employees in each employee type:

1 Salaried: Type 1
14 Full–time: Type 2
2 Part–time: Type 3
0 Other
17 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees on Weekly Payroll – – 17

week30.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	31	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 29–Jul	Monday 30–Jul	Tuesday 31–Jul	Wednesday 01–Aug	Thursday 02–Aug	Friday 03–Aug	Saturday 04–Aug	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		6.50 R			6.00 R	6.00 R		18.5
4	Finney, Margaret	3			3.50 R	3.50 R	3.00 R	3.50 R	7.75 R	21.25
5	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	5.50 R	7.00 R	4.25 R	37.75
6	Gomez, Harold	2		7.00 R	7.00 R	6.75 R	7.00 R	7.00 R		34.75
7	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Murdy, Robert	2		7.00 R	6.00 R			7.00 R		20
9	Palmiter, Kathleen	2		7.00 V	7.00 V	7.00 V	7.00 V	7.00 V		35
10	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Rachner, Bruce	2			7.00 R	7.00 R	7.00 R	7.00 R		28
12	Reno, Regina	2		6.75 R	6.75 R	6.75 R	7.00 R	7.00 R		34.25
13	Rodriguez, Christine	2		7.00 R	6.75 R	7.00 R	7.00 R	7.00 R		34.75
14	Smith, Henry	2		7.00 R	7.00 R	7.00 R	6.75 R	6.50 R		34.25
15	Thome–Steiner, Lizbet	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16	Wilds, Joseph	2		7.00 R	7.00 R	7.00 R	3.75 R	6.50 R		31.25
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
13 Full–time: Type 2
2 Part–time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily: 14 | 15 | 14 | 15 | 16

Number of Employees on Weekly Payroll – – 16

week31.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	32	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 05–Aug	Monday 06–Aug	Tuesday 07–Aug	Wednesday 08–Aug	Thursday 09–Aug	Friday 10–Aug	Saturday 11–Aug	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R		7.00 R	7.00 R	7.00 R		28
3	Cunningham, Bernice	3		6.50 R		5.75 R	5.00 R	5.00 R		22.25
4	Finney, Margaret	3		3.50 R	2.25 R	2.25 R		2.25 R	6.00 R	16.25
5	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
6	Gomez, Harold	2		7.00 R	7.00 R	6.75 R	7.00 R	7.00 R		34.75
7	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.50 R	7.00 R		35.5
8	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Palmiter, Kathleen	2		7.00 V	7.00 V	7.00 V	7.00 V			28
10	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Reno, Regina	2		7.00 R	7.00 R	7.00 R	7.00 R			28
13	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	6.00 R		34
15	Thome–Steiner, Lizbet	2		7.00 R		7.00 R	7.00 R	4.00 R		25
16	Wilds, Joseph	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
13 Full–time: Type 2
2 Part–time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	16	13	16	15	14

Number of Employees on Weekly Payroll – – 16

week32.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No. 33		Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 12–Aug	Monday 13–Aug	Tuesday 14–Aug	Wednesday 15–Aug	Thursday 16–Aug	Friday 17–Aug	Saturday 18–Aug	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	2		7.00 R	7.00 R	6.75 R	7.00 R	7.00 R		34.75
3	Cunningham, Bernice	3		5.50 R		6.00 R	5.50 R	5.25 R		22.25
4	Finney, Margaret	3		3.00 R	3.50 R		3.50 R	3.00 R	8 R	21
5	Freeman, Ron	2		6.50 R	7.00 R	7.00 R	7.00 R	7.00 R		34.5
6	Gomez, Harold	2		6.75 R	7.00 R	6.75 R		7.00 R		27.5
7	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Palmiter, Kathleen	2		7.00 V	7.00 V	7.00 V	7.00 V	7.00 V		35
11	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Rachner, Bruce	2		7.00 R	5.00 R	7.00 R	7.00 R	7.00 R		33
13	Reno, Regina	2			7.00 R	7.00 R	7.00 R	6.75 R		27.75
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Sallee, Wayne	2		6.75 R	7.00 R	6.25 R		7.00 R		27
16	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
17	Thome–Steiner, Lizbet	2		7.00 R	7.00 R	6.75 R	7.00 R	6.75 R		34.5
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
14 Full–time: Type 2
2 Part–time: Type 3
0 Other
17 Total Employees

Hourly Descriptions:

R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	**16**	**16**	**16**	**15**	**17**

Number of Employees on Weekly Payroll – – 17

week33.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	34	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 19–Aug	Monday 20–Aug	Tuesday 21–Aug	Wednesday 22–Aug	Thursday 23–Aug	Friday 24–Aug	Saturday 25–Aug	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cunningham, Bernice	3			5.00 R		5.00 R	5.50 R		15.5
3	Finney, Margaret	3		3.25 R	3.50 R	3.50 R	2.00 R	3.25 R		15.5
4	Freeman, Ron	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
5	Gomez, Harold	2		7.00 R	7.00 R	4.50 R	7.00 R	7.00 R		32.5
6	Lindley, Linda	2		7.00 R	7.00 R	7.50 R	7.00 R	7.00 R		35.5
7	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	7.00 R	6.75 R		34.75
8	Murdy, Robert	2		7.00 R	7.00 R	6.00 R	7.00 R	7.00 R		34
9	Palmiter, Kathleen	2								0
10	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Reno, Regina	2		7.00 R	7.00 R	7.00 R	7.00 R	6.50 R		34.5
13	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Sallee, Wayne	2		6.75 R	7.00 R	7.00 R	7.00 R	7.00 R		34.75
15	Smith, Henry	2		6.50 R	7.00 R	7.00 R	7.00 R	7.00 R		34.5
16	Thome–Steiner, Lizbet	2		2.25 R						2.25
17	Wilds, Joseph	2								0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
14 Full–time: Type 2
2 Part–time: Type 3
0 Other
17 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	14	14	13	14	14

Number of Employees on Weekly Payroll – – 17

week34.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	35	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 26–Aug**	**Monday 27–Aug**	**Tuesday 28–Aug**	**Wednesday 29–Aug**	**Thursday 30–Aug**	**Friday 31–Aug**	**Saturday 01–Sep**	**Total Hours**
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cunningham, Bernice	3				5.50 R		4.75 R		10.25
3	Finney, Margaret	3		3.50 R	3.50 R	3.50 R	3.00 R	2.75 R	9 R	25.25
4	Freeman, Ron	2		6.50 R	7.00 R	4.00 R	7.00 R	4.75 R		29.25
5	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
6	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	6.75 R	7.00 R		34.75
8	Murdy, Robert	2		7.00 R	7.00 R	6.00 R	7.00 V	7.00 V		34
9	Palmiter, Kathleen	2								0
10	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Rachner, Bruce	2			7.00 R	7.00 R	7.00 R	7.00 R		28
12	Reno, Regina	2		2.25 R	7.00 R	6.75 R	6.75 ?	6.50 R		29.25
13	Rodriguez, Christine	2		6.75 R	7.00 R	-	7.00 R	7.00 R		27.75
14	Sallee, Wayne	2		7.00 R	7.00 R	7.00 R	7.00 R			28
15	Smith, Henry	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16										0
17										0
18										0
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Number of Employees Working Daily: 12 | 13 | 13 | 13 | 13

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees on Weekly Payroll – – 15

week35.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	36	Weekend	Holiday	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 02-Sep	Monday 03-Sep	Tuesday 04-Sep	Wednesday 05-Sep	Thursday 06-Sep	Friday 07-Sep	Saturday 08-Sep	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cunningham, Bernice	3			5.00 R		5.50 R	5.00 R		15.5
3	Finney, Margaret	3			4.00 R	11.00 R				15
4	Gomez, Harold	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
5	Lindley, Linda	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
6	Morley, Colleen	2		7.00 H	7.00 R	7.00 R	6.75 R	6.75 R		34.5
7	Murdy, Robert	2		7.00 H	7.00 V	7.00 V	7.00 R	7.00 R		35
8	Palmiter, Kathleen	2								0
9	Paul, Mary	2		7.00 H	7.00 R	7.00 R	8.00 R	7.00 R		36
10	Rachner, Bruce	2		7.00 H	7.00 R	7.00 R	6.75 R	7.00 R		34.75
11	Reno, Regina	2		7.00 H	6.75 R	6.50 R	8.25 R	7.00 R	2.25 R	37.75
12	Rodriguez, Christine	2		7.00 H						7
13	Sallee, Wayne	2		7.00 H	7.00 R	7.00 R	7.00 R			28
14	Smith, Henry	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
15										0
16										0
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
11 Full-time: Type 2
2 Part-time: Type 3
0 Other
14 Total Employees

Hourly Descriptions:
R - Regular Pay
H - Holiday pay
V - Vacation Pay
S - Sick Pay

Number of Employees Working Daily: 12 11 11 10

Number of Employees on Weekly Payroll -- 14

week36.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	37	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 09-Sep	Monday 10-Sep	Tuesday 11-Sep	Wednesday 12-Sep	Thursday 13-Sep	Friday 14-Sep	Saturday 15-Sep	Total Hours
1	Ballard, Carolyn	2		7.00 R	7.00 R	6.75 R	7.00 R	6.75 R		34.5
2	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
3	Bury, Sandra	3							5.5 R	5.5
4	Cunningham, Bernice	3		2.50 R				5.50 R		8
5	Finney, Margaret	3			7.50 R	12.25 R	12.00 R	11.75 R	6.5 R	50
6	Gomez, Harold	2		7.00 R	7.00 R	7.00 R		7.00 R		28
7	Lindley, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	7.00 R	6.75 R		34.75
9	Murdy, Robert	2		7.00 R	4.50 R		7.00 R	7.00 R		25.5
10	Palmiter, Kathleen	2								0
11	Paul, Mary	2		7.00 R	7.00 R	7.50 R	7.00 S	7.00 R		35.5
12	Rachner, Bruce	2				7.00 R	7.00 R	7.00 R		21
13	Reno, Regina	2		6.50 R	7.00 R	6.50 R	6.50 R	6.50 R		33
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Sallee, Wayne	2		7.00 R	7.25 R	7.25 R				21.5
16	Smith, Henry	2		7.00 R	7.00 R	7.00 R	6.75 R			27.75
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
12 Full-time: Type 2
3 Part-time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R - Regular Pay
H - Holiday Pay
V - Vacation Pay
S - Sick Pay

Number of Employees Working Daily: 12 | 12 | 12 | 11 | 12

Number of Employees on Weekly Payroll -- 16

week37.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	38	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 16–Sep	Monday 17–Sep	Tuesday 18–Sep	Wednesday 19–Sep	Thursday 20–Sep	Friday 21–Sep	Saturday 22–Sep	Total Hours
1	Ballard, Carolyn	2		7.00 R	6.50 R	6.75 R	7.00 R	R		27.25
2	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
3	Bury, Sandra	3						2.50 R	6.25 R	8.75
4	Cunningham, Bernice	3								0
5	Finney, Margaret	3		12.00 R	3.50 R	3.50 R		3.00 R	7.00 R	29
6	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	6.75 R		34.75
7	Lindley, Linda	2		7.00 S	7.00 R	7.00 R	7.00 R	7.00 R		35
8	Morley, Colleen	2		6.75 R	7.00 R	2.00 R				15.75
9	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Palmiter, Kathleen	2								0
11	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Reno, Regina	2		6.50 R	6.50 R	7.00 R	7.00 R	6.75 R		33.75
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Sallee, Wayne	2		7.00 R	7.00 R	7.00 R	7.00 R			28
16	Smith, Henry	2		6.75 R	7.00 R	7.00 R	7.00 R	5.50 R		33.25
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
3 Part–time: Type 3
0 Other
16 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	13	13	13	11	11

Number of Employees on Weekly Payroll – – 16

week38.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	39	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 23–Sep	Monday 24–Sep	Tuesday 25–Sep	Wednesday 26–Sep	Thursday 27–Sep	Friday 28–Sep	Saturday 29–Sep	Total Hours
1	Ballard, Carolyn	2		7.50 R		7.50 R	7.50 R	7.50 R		30
2	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
3	Bury, Sandra	3							4.75 R	4.75
4	Cunningham, Bernice	3								0
5	Finney, Margaret	3		3.75 R	3.50 R	2.75 R	3.50 R	3.50 R	10.50 R	27.5
6	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Gomez, Harold	2		6.50 R		7.00 R	6.75 R	7.00 R		27.25
8	Morley, Colleen	2		7.00 R	7.00 R	6.75 R	6.75 R	7.00 R		34.5
9	Murdy, Robert	2		6.25 R	7.00 R	7.00 R	7.00 R	7.00 R		34.25
10	O'Connor, Catherine	2								0
11	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 S			28
13	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Reno, Regina	2		7.00 R	7.00 R	6.50 R	6.50 R			27
15	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16	Sallee, Wayne	2		7.00 R	7.00 R	7.00 R				21
17	Smith, Henry	2		7.00 R	7.00 R	7.00 R		6.75 R		27.75

Employees in each employee type:

1 Salaried: Type 1
13 Full–time: Type 2
3 Part–time: Type 3
0 Other
17 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	14	12	14	12	11

Number of Employees on Weekly Payroll – – 17

week39.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	40	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 30–Sep**	**Monday 01–Oct**	**Tuesday 02–Oct**	**Wednesday 03–Oct**	**Thursday 04–Oct**	**Friday 05–Oct**	**Saturday 06–Oct**	**Total Hours**
1	Ballard, Carolyn	2		7.00 R	7.00 R	6.75 R	6.75 R			27.5
2	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
3	Bury, Sandra	3							**5.75 R**	5.75
4	Cunningham, Bernice	3					6.50 R	5.00 R		11.5
5	Finney, Margaret	3		3.50 R	3.75 R	3.00 R	3.00 R	3.50 R	**10.50 R**	27.25
6	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.50 R	7.00 R		35.5
7	Gendron, Derek	2						7.00 R		7
8	Gibson, Scott	2						7.00 R		7
9	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Morley, Colleen	2		6.75 R	7.00 R	6.75 R	7.00 R	7.00 R		34.5
11	Murdy, Robert	2		7.00 R	7.00 R			7.00 R		21
12	O'Connor, Catherine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Paul, Mary	2		6.75 R	7.00 R	7.00 R	7.00 R	7.00 R		34.75
15	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16	Reno, Regina	2		7.00 R	7.00 R	6.50 R	1.00 R			21.5
17	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
18	Sallee, Wayne	2		7.00 R	7.00 R	7.00 R		6.75 R		27.75
19	Smith, Henry	2		6.75 R	7.00 R	7.00 R	7.00 R	R		27.75

Employees in each employee type:

1 Salaried: Type 1
15 Full–time: Type 2
3 Part–time: Type 3
0 Other
19 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily: 15 15 14 14 15

Number of Employees on Weekly Payroll – – 19

week40.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	41	Weekend	Holiday	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 07–Oct	Monday 08–Oct	Tuesday 09–Oct	Wednesday 10–Oct	Thursday 11–Oct	Friday 12–Oct	Saturday 13–Oct	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Bury, Sandra	3							5.50 R	5.5
3	Cunningham, Bernice	3			6.25 R		6.25 R	6.00 R		18.5
4	Czaja, Kimberly	2			7.00 R	7.00 R	7.00 R	7.00 R		28
5	Finney, Margaret	3		11.00 R	3.00 R	3.00 R	3.50 R	2.75 R	10.25 R	33.5
6	Gallagher, Linda	2				7.00 R	7.00 R	7.00 R		21
7	Gendron, Derek	2			7.00 R		7.00 R	7.00 R		21
8	Gibson, Scott	2			7.00 R	7.00 R	7.00 R	7.00 R		28
9	Gomez, Harold	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Kalovsky, Norman	2			2.50 R	2.50 R	2.50 R			7.5
11	Morley, Colleen	2		7.00 H	6.75 R	7.00 R	7.00 R	7.00 R		34.75
12	Murdy, Robert	2		7.00 H	8.00 R	7.00 R	7.00 R	7.00 R		36
13	O'Connor, Catherine	2		7.00 H	7.00 R	7.00 R	7.00 R			28
14	Palmiter, Kathleen	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Paul, Mary	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
16	Rachner, Bruce	2		7.00 H	7.00 R	7.00 R		7.00 R		28
17	Rodriguez, Christine	2		7.00 H	7.00 R	7.00 R	7.00 R	7.00 R		35
18	Sallee, Wayne	2		5.00 R	7.00 R	6.75 R				18.75
19										0

Employees in each employee type:

1 Salaried: Type 1
14 Full–time: Type 2
3 Part–time: Type 3
0 Other
18 Total Employees

Hourly Descriptions:

R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:		16	15	15	14	

Number of Employees on Weekly Payroll – – 18

week41.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	42	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 14–Oct	Monday 15–Oct	Tuesday 16–Oct	Wednesday 17–Oct	Thursday 18–Oct	Friday 19–Oct	Saturday 20–Oct	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cunningham, Bernice	3		5.50 R	5.25 R		5.50 R	5.50 R	6.00 R	27.75
3	Czaja, Kimberly	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
4	Finney, Margaret	3		3.00 R	3.00 R	4.00 R	3.50 R	3.00 R		16.5
5	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
6	Gendron, Derek	2		7.00 R	7.00 R	7.00 R	5.50 R	7.00 R		33.5
7	Gibson, Scott	2		7.00 R		7.00 R	6.75 R	7.00 R		27.75
8	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Kalovsky, Norman	2		2.75 R	2.50 R	2.75 R	2.75 R			10.75
10	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Murdy, Robert	2		7.00 R	6.75 R	7.00 R	7.00 R	7.00 R		34.75
12	O'Connor, Catherine	2		4.00 R	7.00 R	7.00 R	9.00 R			27
13	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Rachner, Bruce	2		7.00 R	7.00 R		7.00 R	7.00 R		28
16	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
17	Sallee, Wayne	2		7.00 R	7.50 R	7.00 R			2.75 R	24.25
18										0

Employees in each employee type:

1 Salaried: Type 1
14 Full–time: Type 2
2 Part–time: Type 3
0 Other
17 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	17	16	15	16	14

Number of Employees on Weekly Payroll – – 17

week42.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	43	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	**Type**	**Sunday 21 – Oct**	**Monday 22 – Oct**	**Tuesday 23 – Oct**	**Wednesday 24 – Oct**	**Thursday 25 – Oct**	**Friday 26 – Oct**	**Saturday 27 – Oct**	**Total Hours**
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cunningham, Bernice	3				5.50 R	5.50 R	5.25 R		16.25
3	Czaja, Kimberly	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
4	Finney, Margaret	3		3.50 R	3.50 R	3.50 R	3.00 R	3.50 R	**7.0 R**	24
5	Gallagher, Linda	2		7.00 R	7.00 R		7.00 R	7.00 R		28
6	Gendron, Derek	2		8.00 R	7.00 R	7.00 R	7.00 R	7.00 R		36
7	Gibson, Scott	2		7.00 R		7.00 R	7.00 R			21
8	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Kalvesky, Norman	2		3.00 R	2.50 R	2.50 R	2.25 R	3.00 R		13.25
10	Morley, Colleen	2		7.00 R	7.00 R	8.00 R	4.25 R	7.00 R		33.25
11	Murdy, Robert	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
12	O'Connor, Catherine	2		7.00 R	7.00 R	8.00 R	7.00 R	6.50 R	**6.5 R**	42
13	Palmiter, Kathleen	2		7.00 R	7.00 R	8.00 R	7.00 R	7.00 R		36
14	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16	Rodriguez, Christine	2		7.00 R	7.00 R	8.00 R	7.00 R	7.00 R		36
17	Sallee, Wayne	2		7.00 R	7.00 R	7.00 R			**4.5 R**	25.5
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
14 Full-time: Type 2
2 Part-time: Type 3
0 Other
17 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	16	15	16	16	15

Number of Employees on Weekly Payroll – – 17

week43.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	44	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 28-Oct	Monday 29-Oct	Tuesday 30-Oct	Wednesday 31-Oct	Thursday 01-Nov	Friday 02-Nov	Saturday 03-Nov	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cremins, Lori	2		6.75 R	7.00 R	6.50 R	7.00 R	7.00 R		34.25
3	Cunningham, Bernice	3		5.50 R	5.00 R		5.00 R	7.00 R		22.5
4	Czaja, Kimberly	2		7.00 R	7.00 R		7.00 R	7.00 R		28
5	Finney, Margaret	3		3.50 R	3.50 R	3.00 R	3.50 R	3.50 R	6.00 R	23
6	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.50 R	7.00 V		35.5
7	Gendron, Derek	2		7.00 R	7.00 R	7.00 R	7.00 R			28
8	Gibson, Scott	2		7.00 R	7.00 R	6.50 R	6.75 R	7.00 R		34.25
9	Gomez, Harold	2		7.00 R	5.50 R	7.00 R	7.00 R	7.00 R		33.5
10	Kalvesky, Norman	2		2.50 R	2.75 R	2.50 R	2.50 R	2.50 R		12.75
11	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	7.00 R	6.00 R		34
12	Murdy, Robert	2		7.00 R	5.25 R	7.00 R	7.00 R	7.50 R		33.75
13	O'Connor, Catherine	2		7.00 R	7.00 R	7.00 R	10.00 R			31
14	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.50 R		35.5
15	Paul, Mary	2		7.00 R	7.00 R	8.00 R	7.00 R	7.00 R		36
16	Rachner, Bruce	2		7.00 R	5.00 R	7.00 R	7.00 R	7.00 R		33
17	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	8.00 R	7.00 R		36
18	Sallee, Wayne	2		7.00 R	7.00 R	7.00 R				21
19										0
20										0

Employees in each employee type:

1 Salaried: Type 1
15 Full-time: Type 2
2 Part-time: Type 3
0 Other
18 Total Employees

Hourly Descriptions:
R - Regular Pay
H - Holiday pay
V - Vacation Pay
S - Sick Pay

Number of Employees Working Daily:	18	18	16	17	15

Number of Employees on Weekly Payroll - - 18

week44.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	45	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 04–Nov	Monday 05–Nov	Tuesday 06–Nov	Wednesday 07–Nov	Thursday 08–Nov	Friday 09–Nov	Saturday 10–Nov	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cunningham, Bernice	3								0
3	Czaja, Kimberly	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
4	Finney, Margaret	3		3.50 R		3.50 R	3.50 R	3.00 R	6 R	19.5
5	Freeman, Ron	2							4 R	4
6	Gallagher, Linda	2		8.00 R	6.50 R	7.00 R	7.00 R	7.00 R		35.5
7	Gendron, Derek	2		7.00 R	7.00 R	7.00 R	7.00 R	6.50 R		34.5
8	Gibson, Scott	2			7.00 R	6.75 R	6.75 R	6.75 R		27.25
9	Gomez, Harold	2			7.00 R	7.00 R	7.00 R	7.00 R	5 R	33
10	Kalvesky, Norman	2		2.50 R	2.50 R	2.75 R	2.75 R	1.50 R		12
11	Morley, Colleen	2			7.00 R	7.00 R	7.00 R	7.00 R		28
12	Murdy, Robert	2		7.25 R	7.00 R	7.00 R	7.00 R	7.00 R		35.25
13	O'Connor, Catherine	2		7.00 R	7.00 R	7.50 R	7.00 R	7.00 R	8 R	43.5
14	Palmiter, Kathleen	2		8.00 R	7.00 R	7.00 R	7.00 R	7.00 R		36
15	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16	Rachner, Bruce	2		3.00 R	7.00 R	7.00 R	7.00 R	7.00 R		31
17	Rodriguez, Christine	2		7.00 S	7.00 V	7.00 R	7.00 R	7.00 R		35
18	Sallee, Wayne	2		4.50 R	7.00 R	7.00 R				18.5
19										0

Employees in each employee type:

1 Salaried: Type 1
15 Full–time: Type 2
2 Part–time: Type 3
0 Other
18 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	13	15	16	15	15

Number of Employees on Weekly Payroll – – 18

week45.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	46	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 11–Nov	Monday 12–Nov	Tuesday 13–Nov	Wednesday 14–Nov	Thursday 15–Nov	Friday 16–Nov	Saturday 17–Nov	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cremins, Lori	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		5.50 R	5.00 R	4.75 R	5.50 R	4.25 R		25
4	Czaja, Kimberly	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
5	Finney, Margaret	3		3.50 R	3.50 R	3.00 R	2.25 R	1.25 R	3.00 R	16.5
6	Freeman, Ron	2							2.00 R	2
7	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.50 R	7.00 R		35.5
8	Gendron, Derek	2		6.00 R	7.00 R	7.00 R		6.75 R	1.50 R	28.25
9	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
10	Kalvesky, Norman	2		2.50 R	2.50 R	1.50 R	2.50 R			9
11	Morley, Colleen	2		7.00 R	6.75 R		7.00 R	6.50 R		27.25
12	Murdy, Robert	2		5.75 R	7.00 R	7.00 R	7.00 R	7.00 R		33.75
13	O'Connor, Catherine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
14	Palmiter, Kathleen	2		7.00 R		7.00 R	7.00 R	7.00 R		28
15	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R	6.75 R		34.75
16	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
17	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
18	Sallee, Wayne	2		6.25 R	7.00 R	7.00 R				20.25
19										0

Employees in each employee type:

1 Salaried: Type 1
15 Full-time: Type 2
2 Part-time: Type 3
0 Other
18 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	17	16	16	15	15

Number of Employees on Weekly Payroll – – 18

week46.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	47	Weekend	Working Day	Working Day	Working Day	Holiday	Holiday	Weekend	
	Employees On Payroll	Type	**Sunday 18–Nov**	**Monday** 19–Nov	**Tuesday** 20–Nov	**Wednesday** 21–Nov	**Thursday** 22–Nov	**Friday** 23–Nov	**Saturday 24–Nov**	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cremins, Lori	2		7.00 R	7.00 R	7.00 R	7.00 H	7.00 H		35
3	Cunningham, Bernice	3								0
4	Czaja, Kimberly	2		7.00 R	7.00 R	7.00 R	7.00 H	7.00 H	**3.0 R**	38
5	Finney, Margaret	3		2.50 R	3.00 R			5.75 R	**7.0 R**	18.25
6	Freeman, Ron	2							**4.5 R**	4.5
7	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.00 H	7.00 H		35
8	Gendron, Derek	2		7.00 R	7.00 R	7.50 R				21.5
9	Gibson, Scott	2		7.00 R	7.00 R	7.00 R				21
10	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 H	7.00 H		35
11	Kalvosky, Norman	2		2.50 R	2.50 R	1.75 R				6.75
12	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	7.00 H	7.00 H		35
13	Murdy, Robert	2		6.00 R	7.00 R	7.00 R	7.00 H	7.00 H		34
14	O'Connor, Catherine	2			7.00 R	7.00 R	7.00 H	7.00 H	**7.0 R**	35
15	Palmiter, Kathleen	2		8.00 R	7.00 R	7.00 R	7.00 H	7.00 H		36
16	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 H	7.00 H		35
17	Rachner, Bruce	2		4.00 R	7.00 R	7.00 R	7.00 H	7.00 H		32
18	Rodriguez, Christine	2		7.00 V	7.00 V	7.00 V	7.00 H	7.00 H		35
19	Sallee, Wayne	2		7.00 R	7.00 R	7.00 R	7.00 H	7.00 H		35
20	Slevin, Paul	2		7.00 R	7.00 R	7.00 R				21

Employees in each employee type:

1 Salaried: Type 1
17 Full–time: Type 2
2 Part–time: Type 3
0 Other
20 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily: 17 | 18 | 17

Number of Employees on Weekly Payroll – – 20

week47.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	48	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 25–Nov	Monday 26–Nov	Tuesday 27–Nov	Wednesday 28–Nov	Thursday 29–Nov	Friday 30–Nov	Saturday 01–Dec	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cremins, Lori	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3					4.50 R	4.50 R		9
4	Czaja, Kimberly	2		7.00 R	7.00 R		11.00 R			25
5	Finney, Margaret	3		2.75 R	3.25 R	3.00 R		3.00 R	**6.50 R**	18.5
6	Freeman, Ron	2							**4.00 R**	4
7	Gallagher, Linda	2		8.00 R	7.00 R	7.00 R	7.50 R	7.00 R		36.5
8	Gendron, Derek	2		7.00 R		7.00 R	7.00 R	7.00 R		28
9	Gibson, Scott	2		6.50 R	6.75 R	6.75 R	6.75 R			26.75
10	Gomez, Harold	2		7.00 R		7.00 R	7.00 R	7.00 R		28
11	Kalvosky, Norman	2		2.50 R	2.50 R	2.50 R	2.50 R			10
12	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
13	Murdy, Robert	2		7.00 R	7.00 R	8.00 R	7.00 R	6.75 R		35.75
14	O'Connor, Catherine	2		7.00 R	7.00 R	8.00 R	7.00 R	7.00 R		36
15	Palmiter, Kathleen	2		7.00 R	7.00 R	8.00 R	7.00 R	7.00 R		36
16	Paul, Mary	2		7.00 R	7.00 R	7.00 R	7.00 R			28
17	Rachner, Bruce	2		7.00 R	7.00 R	7.00 R				21
18	Rodriguez, Christine	2		7.00 V	7.00 R	7.00 R	7.00 R	7.00 R		35
19	Sallee, Wayne	2		7.00 R	6.50 R	7.00 R				20.5
20	Slevin, Paul	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35

Employees in each employee type:

1 Salaried: Type 1
17 Full–time: Type 2
2 Part–time: Type 3
0 Other
20 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	18	16	17	16	13

Number of Employees on Weekly Payroll – – 20

week48.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	49	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 02-Dec	Monday 03-Dec	Tuesday 04-Dec	Wednesday 05-Dec	Thursday 06-Dec	Friday 07-Dec	Saturday 08-Dec	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cremins, Lori	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3								0
4	Evans, John	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
5	Finney, Margaret	3		3.50 R	3.75 R	3.50 R	3.25 R	2.25 R	4.25 R	20.5
6	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Gendron, Derek	2		7.00 R	7.50 R		9.00 R	4.50 R		28
8	Gomez, Harold	2		7.00 R	6.25 R	7.00 R	7.00 R	6.50 R		33.75
9	Kalovsky, Norman	2		2.50 R	2.50 R	2.50 R	2.50 R	1.50 R		11.5
10	Lipcorn, Bill	2		7.00 R	7.00 R	7.25 R	7.25 R	7.25 R		35.75
11	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	6.50 R	6.75 R		34.25
12	Murdy, Robert	2		6.25 R	8.00 R	6.25 R	7.00 R	6.50 R		34
13	O'Connor, Catherine	2		7.00 S	7.00 R	7.00 R	7.00 R	6.50 R	7.00 R	41.5
14	Palmiter, Kathleen	2		7.75 R	7.00 R	7.00 R	7.00 R	6.50 R		35.25
15	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
16	Sallee, Wayne	2		7.00 R	7.00 R	7.00 R				21
17	Slevin, Paul	2		7.00 R	7.00 R	7.00 R	7.00 R	6.75 R		34.75
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
14 Full-time: Type 2
2 Part-time: Type 3
0 Other
17 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily: 16 16 15 15 15

Number of Employees on Weekly Payroll – – 17

week49 wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	50	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 09–Dec	Monday 10–Dec	Tuesday 11–Dec	Wednesday 12–Dec	Thursday 13–Dec	Friday 14–Dec	Saturday 15–Dec	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cremins, Lori	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		4.50 R			4.00 R			8.5
4	Evans, John	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
5	Finney, Margaret	3		3.50 R	3.50 R	3.50 R	3.25 R	2.25 R	6.25 R	22.25
6	Gallagher, Linda	2		8.00 R	8.00 R	7.00 R	7.00 R	7.00 R		37
7	Gendron, Derek	2		8.00 R	8.00 R	7.50 R	8.00 R	8.00 R		39.5
8	Gomez, Harold	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
9	Kalvosky, Norman	2		2.50 R	2.50 R	2.50 R	2.50 R	1.50 R		11.5
10	Lipcorn, Bill	2		7.25 R	8.00 R	7.75 R	8.00 R	8.00 R		39
11	Morley, Colleen	2		7.75 R	8.00 R	7.00 R	7.00 R	7.00 R		36.75
12	Murdy, Robert	2		7.00 R	7.00 R	6.50 R	7.00 R	7.00 R		34.5
13	O'Connor, Catherine	2		7.00 R	7.00 R	7.00 R	7.00 R	6.75 R		34.75
14	Palmiter, Kathleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Rodriguez, Christine	2		6.75 R	8.00 R	7.00 R	7.00 R	7.00 R		35.75
16	Sallee, Wayne	2		4.00 R	6.75 R	7.00 R		4.25 R		22
17	Slevin, Paul	2		7.00 R	7.00 R	7.00 R	7.00 R			28
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
14 Full–time: Type 2
2 Part–time: Type 3
0 Other
17 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	17	16	16	16	15

Number of Employees on Weekly Payroll – – 17

week50.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	51	Weekend	Working Day	Working Day	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 16–Dec	Monday 17–Dec	Tuesday 18–Dec	Wednesday 19–Dec	Thursday 20–Dec	Friday 21–Dec	Saturday 22–Dec	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cremins, Lori	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
3	Cunningham, Bernice	3		4.50 R						4.5
4	Evans, John	2		7.75 R	9.50 R	6.75 R	7.00 R	7.00 R		38
5	Finney, Margaret	3		2.50 R	2.50 R	3.25 R	3.00 R	3.00 R	6.50 R	20.75
6	Gallagher, Linda	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
7	Gendron, Derek	2		7.25 R	5.50 R	7.25 R	7.00 R	7.50 R		34.5
8	Gomez, Harold	2		6.25 R	7.00 R	7.00 R	5.00 R	7.00 R		32.25
9	Libman, Bill	2		8.00 R	8.00 R	7.25 R	4.25 R	8.00 R		35.5
10	Morley, Colleen	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
11	Murdy, Robert	2		6.75 R	7.00 R	7.00 R	7.00 R	7.00 R		34.75
12	O'Connor, Catherine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R	6.75 R	41.75
13	Palmiter, Kathleen	2				7.00 R	8.00 R	7.00 R		22
14	Rodriguez, Christine	2		7.00 R	7.00 R	7.00 R	7.00 R	7.00 R		35
15	Sallee, Wayne	2		7.00 R	7.00 R					14
16										0
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday Pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	14	13	13	13	13

Number of Employees on Weekly Payroll – – 15

week51.wk3

Summary of Employees of Metropolitan Educational Enterprises, Inc. for Calendar Year 1990

	Calendar Week No.	52	Weekend	Working Day	Holiday	Working Day	Working Day	Working Day	Weekend	
	Employees On Payroll	Type	Sunday 23–Dec	Monday 24–Dec	Tuesday 25–Dec	Wednesday 26–Dec	Thursday 27–Dec	Friday 28–Dec	Saturday 29–Dec	Total Hours
1	Bieber, Leonard	1		8.00 R	8.00 R	8.00 R	8.00 R	8.00 R		40
2	Cremins, Lori	2		7.00 R	7.00 H		7.75 R	7.75 R		29.5
3	Cunningham, Bernice	3						4.50 R		4.5
4	Evans, John	2		7.00 R	7.00 R	5.75 R	7.00 R	7.50 R	2.00 R	36.25
5	Finney, Margaret	3				7.00 R	3.75 R			10.75
6	Gallagher, Linda	2		7.00 R	7.00 H		7.00 R	7.00 R		28
7	Gendron, Derek	2			7.00 H	6.75 R	6.00 R	7.50 R		27.25
8	Gomez, Harold	2			7.00 H		7.00 R	7.00 R	2.00 R	23
9	Libman, Bill	2		7.00 R		7.25 R	7.00 R	7.00 R		28.25
10	Morley, Colleen	2		7.00 R	7.00 H		7.00 R			21
11	Murdy, Robert	2		7.00 V	7.00 H		7.00 V	7.00 V		28
12	O'Connor, Catherine	2	--	7.00 R						7
13	Palmiter, Kathleen	2		7.00 R	7.00 H'		8.00 R	7.00 R		29
14	Rodriguez, Christine	2		7.00 R	7.00 H		7.00 R	7.00 R		28
15	Sallee, Wayne	2		7.00 R				4.25 R		11.25
16										0
17										0
18										0
19										0

Employees in each employee type:

1 Salaried: Type 1
12 Full–time: Type 2
2 Part–time: Type 3
0 Other
15 Total Employees

Hourly Descriptions:
R – Regular Pay
H – Holiday pay
V – Vacation Pay
S – Sick Pay

Number of Employees Working Daily:	11		5	12	12	

Number of Employees on Weekly Payroll – – 15

week52.wk3

INTERNAL REVENUE SERVICE
REVENUE RULING 55-19 (1955)
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SUBCHAPTER C — TAX ON EMPLOYERS OF EIGHT OR MORE

SECTION 1607 — DEFINITIONS

REGULATIONS 107, SECTION 403.205: Who are employers.

> Circumstances under which a person may be regarded as an employer within the meaning of section 1607(a) of the Federal Unemployment Tax Act, and accordingly liable for the tax imposed under that Act.

Inquiries have been received regarding the method to be used in arriving at a weekly count of employees for purposes of determining liability of an employer under section 1607(a) of the Federal Unemployment Tax Act (subchapter C, chapter 9, Internal Revenue Code of 1939) under certain conditions, particularly where part-time employees are involved.

Section 1607(a) of the Act provides that the term "employer" does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals

who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.

The following questions and answers illustrate the application of the foregoing provisions of the Act.

Question 1. Are employees considered to be in the employ of an employer during the entire week where, because of the long daily hours of employment, the employees are granted 1 or 2 days of absence each week and substitutes replace the absent regular employees?

Answer. The regular employees should be considered to be in the employ of the employer during the entire week. The basis of this conclusion is that the employer-employee relationship which exists between the parties does not terminate by reason of their absence from duty for 1 or 2 days during the week. If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week. S.S.T. 330, C.B. 1938-2, 331.

Question 2(a). Is the number of positions in an enterprise a factor to be considered in determining the number of workers within a week? For example, suppose that an employer had regularly employed seven individuals over a period of weeks, then had to replace an employee who resigned.

Answer. The number of positions in an employer's

organization is not a factor to be considered in determining the number of individuals in his employ for purposes of the Federal Unemployment Tax Act.

Question 2(b). Assuming that the employee had 3 weeks of accrued vacation time, and the replacement employee began his services on the morning following the resigned employee's last day of actual work, would both of those individuals be counted as being "in employment" during the 3-week vacation period?

Answer. An employee who resigns and has vacation time for which he receives his regular compensation is considered as being in the employ of the employer during the vacation period. The employee who replaced him is also "in employment" and both employees should be counted in determining the employer's liability under the Act. As previously indicated, it is immaterial whether the employee actually performs physical services for his employer, provided an employment relationship exists between the parties.

Question 2(c). If there were no vacation period involved, and the former employee left at the end of a working day in the middle of a week, would both workers be counted as being "in employment" to make a count of eight employees for the week, even though there were never more than seven on any 1 day?

Answer. This question is answered in the negative. Since the employment relationship was terminated as of

the end of the employee's last working day, there was no day in the calendar week on which the employer had more than seven individuals in his employ.

Question 3(a). Is the method or frequency of payment considered to be a factor in determining whether or not an employee is "regular" or "permanent?"

Answer. The basis on which compensation is paid, in and of itself, is not a factor to be considered in determining whether a person had the requisite number of employees for the prescribed period to qualify as an employer under the Act.

Question 3(b). Would a worker who is paid on a daily basis always be construed to be "in employment" on only a day-to-day basis?

Answer. The existence of an employment relationship is the controlling factor. Whether or not an employment relationship, once established, continues depends upon the intention of the parties with respect to its continuation. For example, if the agreement between the parties contemplates the performance of services on 1 day each week, the employment relation continues and the employee should be counted in determining liability under the Act even though he is paid at the end of each day. On the other hand, where an employee works 1 day and the understanding between the parties is to the effect that the employer will communicate with the employee if and when his services are needed and that employee will work

if not otherwise engaged, the employment relationship is terminated at the end of the day he worked. In the latter instance, the employee should be counted in the employ of this employer only on the days he actually performs services for him.

Question 4. Would a worker who is hired for a 5-day week and paid every Friday be construed to be "in employment" on Saturday and Sunday even though the employer has no legal right to require services of the worker on those days?

Answer. This worker should be treated as being in the employ of the employer on each of the 7 days of a week until the employer-employee relationship has been definitely terminated. If other employees are employed for the 6th and 7th days of the week, they should be counted as additional employees to those employed on a 5-day week basis.

Question 5. In determining whether an employee is "regular" or "permanent," is any significance attached to the number of days per week that he customarily performs services? For example, would a man who has for years worked only 3 days in each week be construed to be "in employment" on the remaining 4 days of each week?

Answer. It is not necessary to determine whether an employee is "regular" or "permanent" since the term "employer," as defined in the Act, includes every person who employs eight or more employees in employment for

the prescribed period. An employee who has worked for an employer only 3 days in each week for a number of years is considered to be "in employment" on the remaining days of each week.

Question 6. Where an employer could not get full-time employees in his area he had to permit housewives to work half days 3 days per week. Because of this situation, he pays part-time salaries to 12 people each week, even though there are never more than 3 employees in his shop at any one time, nor more than 6 on any one day. What number of employees should be recorded for each week in this situation?

Answer. If the employees are engaged with the understanding that they will perform services for the employer each week, the employer would have 12 individuals in his employ on each day of the week until the employer-employee relationship is terminated.

Supreme Court, U.S.
FILED
MAY 29 1996
CLERK

Nos. 95-259 & 95-779

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DARLENE WALTERS, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

PETITIONERS,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER,

RESPONDENTS.

On Writ of Certiorari
to the United States Court of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONER DARLENE WALTERS

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1988 & Supp. V 1993), applies only to an "employer," in part defined in Section 701(b), 42 U.S.C. § 2000e(b) (1988), to be "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

The question presented is:

Whether that jurisdictional definition is satisfied when an employer maintains fifteen or more employees on the payroll for the requisite number of weeks even though fewer than fifteen employees report to work or are on paid leave on each day of each such week, as to which the courts of appeals are in direct conflict.

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   - a. The plain text of the statute specifies that the existence of an employment relationship determines an employee's inclusion in the jurisdictional count. 20
   - b. Midweek employment changes, a common employment event, give full and complete meaning to the "for each working day" language. 22
   - c. Midweek employment changes were specifically mentioned in the legislative history of the FMLA and appear in the

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d. The day-by-day method engrafts complicated additional factors onto the statute not even remotely suggested by the plain text of the phrase "for each working day." 25

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g. The day-by-day method results in irrational distinctions between employees. 29

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3. If Section 701(b) is ambiguous, the legislative history supports the payroll method. 30

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b. The 1964 legislative history of the Title VII contains a specific explanation of the purpose and meaning of the phrase "for each working day." 31

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4. The day-by-day method is explicitly contrary to the general legislative purposes underlying Title VII -- that of extending Title VII's prohibitions as far as possible without imposing undue expense and burden on small businesses unable to bear that cost. 38

5. Whereas the payroll method is quick and easy to apply, the day-by-day method is difficult, cumbersome and time-consuming and results in irrational distinctions between employees. . . 40

a. The payroll method is easy and swift of application. 40

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OPINIONS BELOW

The opinion of the court of appeals is reported at 60 F.3d 1225, and is reproduced in the Appendix to Ms. Walters' Petition for Certiorari (No. 95-259) at 1a-12a.

The decision and order of the district court are reported at 864 F. Supp. 71, and are reproduced in the same Appendix at 13a-19a.

JURISDICTION

The judgment of the Seventh Circuit was entered on July 18, 1995. Petitioner Darlene Walters filed a timely petition for a writ of certiorari on August 14, 1995 as Case No. 95-259.

On October 10, 1995, Justice Stevens granted the Solicitor General's application for an extension of time to file a petition for a writ of certiorari on behalf of the EEOC to and including November 15, 1995. On November 15, 1995, the Solicitor General filed that petition for a writ of certiorari on behalf of petitioner EEOC as Case No. 95-779.

On March 18, 1996, this Court granted both petitions and consolidated the two cases.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

This case involves the definition of "employer" in Section 701(b) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, Title VII, § 701(b), 78 Stat. 241, 253 (1964), as amended by Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 104-05 (1972), 42 U.S.C. § 2000e(b) (1988) as amended, which provides, in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . . (Pet. App. 20a).[1]

Other pertinent provisions of Title VII; the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1988 & Supp. V 1993); and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (Supp. V 1993), are reprinted at Pet. App. 20a-29a.

STATEMENT OF THE CASE

Introduction

Respondent Metropolitan Educational Enterprises, Inc. (Metropolitan) sells and finances encyclopedias, dictionaries and other items to retail customers throughout the United States. (Supp. Stips. ¶ 1, JA 17). Respondent Leonard Bieber is the company's sole shareholder, president and chief operating officer. (Answers to Walters' Cmplt. ¶ 3, R. 20 & 21; Stips. ¶ 9, JA 23).[2]

Operating from offices in Chicago, Illinois, Metropolitan

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[1] The Appendix to Ms. Walters' Petition for Writ of Certiorari, filed in Case No. 95-259, is cited as "Pet. App. ___." Her Supplemental Appendix attached to her Supplemental Brief in support of her Petition is cited as "Supp. Pet. App. __." The Joint Appendix filed with this Brief is cited as "JA __." The original record is cited as "R. __."

[2] Both respondents will be referred to as "Metropolitan" unless the context requires separate reference.

transacts business nationwide through a sales force of independent "dealer's representatives" who tender sales contracts obtained from retail customers to Metropolitan. (Supp. Stips. ¶ 4, JA 17-18; Bieber Dep., JA 15-16).

From early 1986 until April 1990, petitioner Darlene Walters was employed by Metropolitan as a collector. (Answers to Walters' Cmplt. ¶ 8, R. 20 & 21).

In September 1989 she was denied a promotion to the position of credit manager. (Stips. ¶ 3, JA 21). Ms. Walters filed a charge of gender discrimination with the EEOC alleging that Metropolitan and Mr. Bieber had illegally denied her the promotion because of her gender and had hired a less qualified male to fill that position. (Answers to Walters' Cmplt. ¶ 6, R. 20 & 21).

On April 23, 1990, Metropolitan and Mr. Bieber discharged Ms. Walters. She thereupon filed another EEOC charge against Metropolitan for illegal retaliation. (Answers to Walters' Cmplt. ¶¶ 14-15, R. 20 & 21).

The District Court Action

Three years later, in April 1993, the EEOC filed suit against Metropolitan and Mr. Bieber alleging that the April 23, 1990 discharge had been illegal retaliation in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3(a) (1988). (EEOC Cmplt., R. 1).

Ms. Walters then intervened as a matter of right under 42 U.S.C. § 2000e-5(f)(1) (1988), asserting both gender discrimination because she had been denied a promotion and retaliation because she had been fired for filing an EEOC

charge. (R. 9-12).[3] She also asserted two claims under Illinois law -- one for retaliatory discharge and a second for breach of contract. (Walters' Cmplt., R. 12).

Separately answering both the EEOC's and Ms. Walters' complaints, Metropolitan and Mr. Bieber admitted that Ms. Walters had been discharged, but denied the Title VII discrimination and retaliation charges and Ms. Walters' state law claims. (Answers, R. 2, 3, 20 & 21). Metropolitan and Mr. Bieber admitted that Metropolitan was engaged in an industry affecting commerce but denied the complaints' jurisdictional allegations, especially that Metropolitan was an "employer" within the meaning of 42 U.S.C. §2000e(b). (*Id.*).

Metropolitan's Motion to Dismiss

Metropolitan moved to dismiss for lack of subject matter jurisdiction (R. 25), claiming under the rule of *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983), that it was not an "employer" under Title VII because in both 1989 and 1990 there were substantially less than twenty weeks in which fifteen or more employees had been present at work or on paid leave on each working day. (Dfs' Mem. in Supp. of Mot. to Dism., R. 26). In *Zimmerman*, which involved a nearly identical jurisdictional provision of the Age Discrimination in

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[3] The EEOC had found no cause on Ms. Walters' original discrimination charge and issued a notice to that effect, also notifying her of her right to institute her own court action. (Walters' Cmplt. ¶ 7, R. 12). Pursuant to that notice, Ms. Walters had previously filed her own Title VII action in the same district court just before her "right to sue" period expired. She dismissed that action upon being granted leave to intervene in the EEOC's case. (Intervention Motion, R. 9; Order Granting Leave to Intervene, R. 10).

Employment Act of 1967 (ADEA), 29 U.S.C. § 630(b) (1982), the Seventh Circuit had held that hourly employees are to be counted toward the ADEA's jurisdictional minimum number of employees only on days they were either physically present at work or on paid leave. The test of *Zimmerman* has come to be known as the "day-by-day" counting method.

Attached to Metropolitan's Motion to Dismiss were two affidavits. One, by Mr. Bieber, explained his company's payroll system and documents. (JA 8-11). The second purported to tabulate the actual working and paid days off of all of Metropolitan's employees during 1989 and 1990. (Falahee Affidavit, R. 26, Ex. 5).

Based on that evidence, Metropolitan and Mr. Bieber asserted that there were no weeks in 1989 and only three weeks in 1990 in which Metropolitan had fifteen or more employees present at work or on paid leave on each working day, far short of the twenty week minimum.

Discovery

Discovery then focused on the complicated jurisdictional factual questions about the number of employees working for Metropolitan during 1989 and 1990, their employment status (salaried vs. hourly and full-time vs. part-time), their working schedules, including days actually worked, and their paid days off including holidays, vacations, sick days and personal days.

Metropolitan's Payroll Records

As part of discovery, Metropolitan produced a series of its payroll records like those described in Mr. Bieber's Affidavit. Two examples of those records are included in the Joint

Appendix. (JA 13A & 14A).[4]

Mr. Bieber's Affidavit explained that every bi-weekly pay period, Metropolitan prepared a "payroll worksheet" showing his salary information and the daily wage information for the hourly employees. That worksheet was forwarded to Metropolitan's automated payroll service, which in turn prepared and sent back a computer generated "payroll register" reflecting bi-weekly payroll information for all Metropolitan's employees on the payroll. (Bieber Affidavit, JA 8-11; Payroll Register and Worksheet, JA 13A & 14A).

Payroll period -- The original payroll register and Mr. Bieber's affidavit also showed that Metropolitan's bi-weekly payroll period ended on Thursday and started on Friday, and thus did not coincide with the beginning and end of a Monday to Friday calendar workweek. Friday was payday for that bi-weekly pay period. (Payroll Register, JA 13A: shows payroll "period ending 3/08/90," a Thursday, & "Date of Check 3/09/90," a Friday).

Thus, these simple records -- which were disclosed early in the case -- enabled the parties to readily ascertain the number of employees on Metropolitan's weekly payroll. However, as useful as the payroll records were, they did not reveal the central information required by the *Zimmerman* day-by-day method -- the daily work and leave history of Metropolitan's employees. Consequently, the parties were forced to examine

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[4] As with all the payroll records first produced by Metropolitan, portions of those two examples, showing salary and other personal information, are blanked out. Eventually the district court ordered Metropolitan to produce unredacted copies of the payroll records, (3/4/94 Minute Order Granting in Part Motion to Compel, *etc.*, R. 32), but those unredacted copies are not included in the record.

even more basic payroll and time-keeping records.

The Stipulations

For the next ten months, the parties made a detailed examination of two years of Metropolitan's payroll registers, time cards, work diaries, and other timekeeping records. (Stips., JA 20-79; EEOC's Mem. of Law, R. 38, p. 14). Mr. Bieber and his part-time bookkeeper, Bernice Cunningham, were deposed. (EEOC's Mem. of Law, R. 38, p. 14). The district court granted the parties permission to investigate the merits if convenient during the discovery on jurisdiction, but they did not do so. (Walters' Mot. to Compel Discovery, *etc.*, R. 32, p. 2 n.2). Due to the complexity of the jurisdictional inquiry, the parties repeatedly requested and were granted extensions of time for completion of discovery and briefing on the jurisdictional issue. (R. 27-36).

The time and leave records examined by the parties were painstakingly reduced to weekly spreadsheet summaries showing in meticulous detail the precise working history of each employee for each day of each calendar week of 1990. The information from those summaries was then reduced to a narrative stipulation which can be found in the Joint Appendix followed by the spreadsheet summaries in their original form. (Stips. JA 20-27; Spreadsheets, JA 28-79).

The crucial stipulations pertaining to jurisdiction are simple:

> During 1990, Metropolitan had fifteen or more employees on its payroll on each working day of forty-seven calendar weeks, but
>
> During 1990, Metropolitan had fifteen or more employees physically present at work or on paid leave

on each working day of only nine weeks.[5]

(Stips. ¶¶ 11 & 12, JA 23-25).

The parties also stipulated to important subsidiary facts relevant to jurisdiction: that Mr. Bieber was Metropolitan's only salaried employee, that during 1990 Metropolitan had two regular part-time employees, and that all the workers listed on the spreadsheets, including Mr. Bieber and the two part-time workers, were "employees" within the meaning of Title VII. (Stips. ¶¶ 9-10, JA 23).

The parties stipulated that Metropolitan's regular working week and hours were Monday to Friday from 9:00 a.m. to 5:00 p.m., that Metropolitan was not open on weekends and that employees were not expected to work on Saturday, Sunday or eleven specified holidays during the year. (Stips. ¶¶ 6-7, JA 22). Thus, they stipulated that Metropolitan's "working days" were all weekdays (Monday to Friday) excluding those holidays. (*Id.* n.1, JA 22).

The parties stipulated that Metropolitan did not have fifteen or more employees in 1989, the year preceding Ms. Walters' termination. (Stips. ¶ 13, JA 26). The parties made no stipulations about 1988.

Finally, Supplemental Stipulations between Ms. Walters and respondents established that Metropolitan was not a small "mom and pop" operation but was indeed a company engaged in an industry affecting commerce with at least twenty

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[5] These facts were different than those originally advanced by Metropolitan that there were only three weeks in 1990 in which the required fifteen or more employees were at work or on paid leave on each working day. (Dfs Mem. in Supp. of Mot. to Dism., R. 26 p. 3).

independent sales representatives (stipulated by the parties not to be Title VII employees) who sold Metropolitan's product lines by door to door solicitation throughout the country and who arranged for installment financing of those sales. (Supp. Stips., JA 17-19).

The Spreadsheets

The fifty-two spreadsheet summaries -- one for each calendar workweek of 1990 -- reveal not only the details of the 1990 work history of Metropolitan's employees, but also the cumbersome process of parsing those details to solve the jurisdictional puzzle. (Spreadsheets, JA 28-79).

The spreadsheet summaries depict every relevant fact about the employment status of all of Metropolitan's employees for each day of 1990 -- including weekends and holidays -- for each calendar week. They show the identity of the employees, whether their compensation was on a salaried or hourly basis and whether they worked full-time or part-time. Each spreadsheet shows for each day of each week, including Saturdays, Sundays and holidays, whether each employee was present at work and if so, how many hours each employee worked. Thus, for example, the spreadsheets depict an employee at work for seven hours on a particular day as "7.00R" -- i.e. seven hours of work receiving regular pay. (*Id.*).

For days off, the spreadsheets show whether an employee received holiday pay, vacation pay or sick pay. Thus, for example, several employees are shown as receiving seven hours of holiday pay -- "7.00 H" -- for New Years Day, Monday, January 1, 1990. (Calendar Week 1 Spreadsheet, JA 28).

Next, the spreadsheets show the total number of hours for which each employee was compensated in each week. Thus, for example, the spreadsheet for Calendar Week No. 1 shows

that Ms. Walters was compensated for a total of 26.25 hours -- seven holiday hours on New Years Day, five regular hours on Tuesday, January 2 (also a company holiday), one regular hour on Wednesday, January 3 (the first regular working day of the week), no hours on Thursday, January 4, eight regular hours on Friday, January 5 (the last working day of the week), and 5.25 regular hours on Saturday, January 6. (*Id.*).

The spreadsheets show the total number of employees working daily on each of Metropolitan's official working days. Thus, for example, in Calendar Week No. 1, there were three working days, Wednesday, Thursday and Friday, and there were fifteen employees at work on each of those days. (*Id.*)

Finally, and significantly, the spreadsheets show the total number of employees on Metropolitan's payroll for each such week. For example, for Calendar Week No. 1, there were a total of sixteen employees -- one salaried, two part-time and thirteen full-time on Metropolitan's payroll. (*Id.*). Of course, that tabulation of employees on the weekly payroll is merely repetitive of what Metropolitan's regular payroll records already revealed. *See* discussion *supra*, pp. 5-6.

Work Patterns

The spreadsheets reveal significant details about the work patterns of Metropolitan's employees.

Midweek employee changes -- First, the spreadsheets show that there were nine weeks in which employees either joined or left Metropolitan's employ during midweek, *i.e.* other than starting on Monday or leaving on Friday.

The most pertinent example of such a midweek employment change event was the termination of petitioner Darlene Walters on Monday, April 23, 1990, in Week 17. (JA

44).

Significantly, other of the midweek changes coincided with the beginning and end of Metropolitan's payroll period, as follows: Week 14 - J. Frawley departs on Monday. (JA 41); Week 17 - S. Davis starts on Thursday (JA 44); Week 24 - W. Sallee starts on Friday, the first day of a payroll period (JA 51); Week 26 - A. Hunter departs on Thursday, the last day of a payroll period (JA 53); Week 29 - J. Wilds departs on Thursday, the last day of a payroll period (JA 56); Week 34 - L. Thome-Steiner departs on Monday (JA 61); Week 40 - D. Gendron & S. Gibson start on Friday, the first day of a payroll period (JA 67); Week 50 - P. Slevin departs on Thursday, the last day of a payroll period (JA 77).

Weekend hours -- Second, the spreadsheets show that at least one full-time or part-time employee was at work on almost every weekend of the year, especially on Saturdays, even though Saturdays and Sundays were not official working days and employees were not expected to be at work on those days. (Weeks 1, 2, 4, 5, 7, 8, 9-11, 13-33, 35-52; JA 28, 29, 31, 32, 34, 35, 36-38, 40-60, 62-79).

"Flextime" -- The spreadsheets show that while some employees worked a "regular" Monday to Friday workweek, others worked a more flexible schedule such as four days a week, one with longer hours with one day off. In Week 5, for example, R. Reno worked all five days for a total of 34.75 hours while A. Hunter worked only four days, Monday through Thursday, for 34.25 hours. (JA 32).

Make-up hours -- Third, the spreadsheets show that sometimes employees would miss days during the week but work on holidays or weekends: Week 1 - D. Walters (JA 28); Week 14 - D. Walters (JA 41); Week 17 - R. Freeman (JA 44);

Week 21 - R. Freeman (JA 48); Week 26 - A. Hunter (JA 53); Week 46 - D. Gendron (JA 73); Week 47 - C. O'Connor (JA 74) & Week 52 - H. Gomez (JA 79).

Part-time employees -- The company had two part-time employees -- Bernice Cunningham and Margaret Finney. (Stips. ¶ 10, JA 23). Both were on the payroll in all fifty-two weeks. Ms. Finney often worked only a few hours only four days during the workweek and six or more hours on Saturdays. Thus, like the other employees she typically worked five days a week, missing one day during the workweek and working one weekend day. (*See e.g.* Weeks 4, 5 & 10; JA 31, 32 & 37).

Salaried employee-- Mr. Bieber was Metropolitan's only salaried employee. (JA ¶ 9, JA 23). Neither the spreadsheets nor the underlying payroll records reflect the days that Mr. Bieber was present or absent from work. Nor do they show any sick or vacation days on which he may have been absent from work.

Workforce composition -- Although the record does not explicitly state the gender or national origin of Metropolitan's employees, the spreadsheets show that there were apparently several women employees and two or three persons with Hispanic surnames. (*See e.g.* Week 1, JA 28).

The Jurisdictional Result

These stipulated facts determined the jurisdictional outcome: Metropolitan did not meet the jurisdictional minimum under the *Zimmerman* day-by-day method because there were only nine weeks in 1990 and no weeks in 1989 in which fifteen or more employees were physically at work or on paid leave on each working day.

The Position of Ms. Walters and the EEOC

However, the EEOC and Ms. Walters asserted that the proper method to determine jurisdiction was to count the number of employees on Metropolitan's weekly payroll, a method of counting that has come to be known as the "payroll method." Because there were forty-seven weeks in 1990 in which Metropolitan had at least fifteen employees on its payroll for each working day, Metropolitan would fall within the jurisdictional reach of Title VII under the payroll method.

The EEOC urged the district court to adopt the payroll method because it was supported by Title VII's legislative history, by judicial authority from other circuits, by the EEOC's own administrative construction of Section 2000e(b), and by subsequent Congressional developments. (EEOC's Opp. to Mot. to Dism., R. 38). In contrast, Ms. Walters conceded that *Zimmerman* controlled and compelled dismissal, but stated her intention to seek the Seventh Circuit's reconsideration of that case and the adoption of the payroll method for the same reasons advanced by the EEOC. (Walters' Mem. on Motion to Dismiss, R. 39, p. 1).

The District Court's Ruling

The district court granted Metropolitan's motion to dismiss on the basis of *Zimmerman* and the stipulated facts. (Pet. App. 18a-19a). The court reasoned that *Zimmerman*, an ADEA case, controlled this, a Title VII case, because of the common purpose of Title VII and the ADEA and their virtually identical definitions of "employer." (*Id.*) Therefore, the court declined to adopt the payroll method of counting employees for the reason that it could not "modify Seventh Circuit precedent." (*Id.* at 17a).

The Ruling of the Court of Appeals

A panel of the court of appeals affirmed, holding that the arguments of Ms. Walters and the EEOC were not sufficiently compelling to overcome the *stare decisis* effect of *Zimmerman*. (Pet. App. at 5a-6a, 11a). Thus, the court held that hourly and part-time workers are to be counted as Title VII employees only on the days they are physically present at work or on paid leave. (*Id.* at 3a-4a, 6a). The court concluded that *Zimmerman*, an ADEA case, controlled because Title VII's definition of employer was virtually identical to that in the ADEA. The court ruled that the day-by-day method was compelled by the statute's plain text and was the only method that gave meaning to the phrase "for each working day." The court rejected the arguments about the conflicting authority from other circuits, the legislative history of Title VII, the subsequent legislative developments and public policy. Judge Ripple concurred in the panel's decision but expressed his doubts about "the correctness of *Zimmerman*." (Pet. App. 11a). Urging a definitive resolution of the conflict, he concluded that

> The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago. (*Id.* at 12a).

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, applies only to certain employers. It defines an employer as a "person . . . who has fifteen or more employees for each working day in each of twenty or more weeks in the current or preceding calendar year."

The plain text of that definition requires a count of all employees an employer "has . . . for each working day" of those weeks. The existence of the employment relationship is determinative. Nothing in the definition even remotely suggests that hourly employees are counted only for each working day they are physically present at work or on paid leave, the counting method approved by court of appeals herein.

The construction approved by the court of appeals engrafts unintended meanings onto the definition, destroys the internal coherence of Title VII and excludes from its coverage its intended beneficiaries. Moreover, that construction does not account for the changing realities of the American employment market.

If the statute is ambiguous, its legislative history commands that all employees be counted for each working day they are employees without reference to any other conditions or factors of employment. The Congressional debate clearly reinforces this interpretation.

Counting all employees on each day they are employed is a quick and easy way to determine jurisdiction. The contrary method approved by the court of appeals -- dependent as it is on additional factors such as presence at work, leave status, and method of compensation -- is complex, difficult, time-consuming and substantially burdensome, so much so that it defeats Title VII's essential legislative purposes of extending the prohibitions of employment discrimination as far as possible without imposing undue expense and burden on small businesses truly unable to bear those costs.

The judgment of the Seventh Circuit should be reversed and this case should be remanded for further proceedings.

ARGUMENT

THE JURISDICTIONAL DEFINITION OF "EMPLOYER" IN TITLE VII SHOULD INCLUDE ALL EMPLOYEES ON THE PAYROLL FOR EACH WORKING DAY OF A WEEK.

1. Introduction.

The question presented is how to determine the jurisdictional reach of the definition of "employer" in Title VII of the Civil Rights Act of 1964.

The prohibitions of Title VII -- invoked in this case against gender discrimination and retaliation -- apply only to an "employer." 42 U.S.C. §§ 2000e-2 & 2000e-3. ("It shall be an unlawful employment practice for an **employer** to. . . "). (Pet. App. 22a-23a) (emphasis added). Section 701(b) of Title VII, 42 U.S.C. § 2000e(b), states that

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . (Pet. App. 20a).

Section 701(a) defines "person" as including "one or more individuals . . . [or] corporations . . . ." 42 U.S.C. § 2000e(a) (Pet. App. at 20a). In turn, Section 701(f) defines "employee" as "an individual employed by an employer . . . ." 42 U.S.C. § 2000e(f) (Pet. App. at 21a).

The jurisdictional definitions of other discrimination statutes are virtually identical. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (1988 & Supp. V 1993) (ADEA) (Pet. App. 24a); the Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (Supp. V 1993)

(FMLA) (Pet. App. 28a); and Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111(5)(A) (Supp. V 1993).

Two conflicting lines of decisions have arisen under Title VII and the ADEA regarding the proper method of determining which employees are within the jurisdictional definitions of employer. One line -- represented by the Seventh Circuit's decision herein and in *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983) (ADEA) -- adopts what is known as the "day-by-day method" that counts hourly-paid workers as employees for a working day only if physically at work or on paid leave on that day.[6] The other line -- represented by the First Circuit's decisions in *Vera-Lozano v. International Broadcasting*, 50 F.3d 67 (1st Cir. 1995) (Title VII) and *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983) (Title VII) -- adopts what has come to be known as the "payroll method" that counts all workers for each working day they are on the payroll whether or not present at work or on

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[6] Other lower court decisions adopting or approving the day-by-day method are: *McGraw v. Warren County Oil Co.*, 707 F.2d 990 (8th Cir. 1983) (ADEA); *EEOC v. Garden and Assocs., Ltd.*, 956 F.2d 842 (8th Cir. 1992) (ADEA); *Goudeau v. Dental Health Services, Inc.*, 901 F. Supp. 1139, 1144-45 (M.D. La. 1995) (Title VII); *Richardson v. Bedford Place Housing Phase I Assocs.*, 855 F. Supp. 366 (N.D. Ga. 1994) (Title VII); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) (ADEA and Title VII) (following but criticizing *Zimmerman*); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Me. 1992) (ADEA); *Norman v. Levy*, 756 F. Supp. 1060, 1063-64 (N.D. Ill. 1990), *supplemental opinion* 767 F. Supp. 1441 (N.D. Ill. 1991) (Title VII); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-09 (S.D. Ohio 1989) (ADEA); and *Schoenbaum v. Orange County Center for the Performing Arts, Inc.*, 677 F. Supp. 1036, 1039 (C.D.Cal. 1987) (ADEA).

paid leave.[7]

The jargon "day-by-day" and "payroll" merely summarize more complicated inquiries. Both methods first inquire into which workers are "employees," and, second, count the number of employees to see if the jurisdictional minimum is met. *See Norman v. Levy*, 756 F. Supp. at 1062 (jurisdictional test is two step, first, determining employee status, and, second, counting number of employees).

In some cases, the first step is complicated, involving a look at the terms and conditions of employment to determine whether a worker fulfills the definition of employee. But this case presents no issue about employee status because the parties

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[7] Other decisions following the payroll method are: *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n. 7 (5th Cir. 1980) (Title VII); *Edwards v. Esau Investments, Inc.*, 66 Fair Empl. Prac. Cas. (BNA) 711 (D. Kan. 1994) (Title VII); *Shepherdson v. Local Union No. 401*, 823 F. Supp. 1245, 1251-52 (E.D. Pa. 1993) (Title VII); *Reith v. Swenson*, 63 Fair Empl. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993) (Title VII); *Cohen v. S.U.P.A. Inc.*, 814 F. Supp. 251, 254-56 (N.D.N.Y. 1993) (ADEA); *Vano v. Au*, 1992 WL 175498 at *2 (W.D. Va. 1992); *Simmons v. Vliets Farmers Coop.*, 55 Fair Empl. Prac. Cas. (BNA) 1341, 1342 (D. Kan. 1991); *Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) (ADEA); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553, 1554 (M.D.N.C. 1984) (Title VII), *aff'd*, 769 F.2d 1012, 1014 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983) (Title VII); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980) (Title VII); *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979) (Title VII); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1327 (D. Minn. 1975) (Title VII), *aff'd*, 566 F.2d 1178 (8th Cir. 1977).

have stipulated that certain of Metropolitan's workers (its office personnel) were employees, and that the rest (its dealer's representatives) were not employees.[8] (Stips. ¶ 8, JA 22-23; Supp. Stips. ¶¶ 2-11, JA 17-19). Nor does this case present an issue about what a "working day" is. The parties have stipulated that Metropolitan's working days were Monday to Friday, 9:00 a.m. to 5:00 p.m. (Stips. ¶ 6, JA 22). The court of appeals did not consider that question and it is not within the scope of the grant of *certiorari*.

Instead, the issue in this case involves the second step -- counting employees toward the jurisdictional minimum "for each working day." The question is: are all employees counted "for each working day" they are on the payroll, or are hourly-paid employees counted only "for each working day" they are physically present at work or on paid leave?

The jurisdiction of the district court turns on the method used. The parties agreed that the jurisdictional minimum was not met in 1989. (Stips. ¶ 13, JA 26). As for 1990, the district court and court of appeals applied the day-by-day method and held that Metropolitan was not a Title VII employer and that there was no jurisdiction because there were only nine weeks during which at least fifteen workers were present at work or on paid leave for each working day. (Stips.¶11, JA 23-24). Had the courts below used the payroll method, however, there would have been jurisdiction by a comfortable margin because Metropolitan had fifteen or more employees on the payroll for each working day of **forty-seven** weeks of 1990. (Stips. ¶ 12, JA 24-25).

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[8] Independent contractors are not Title VII employees. *See Wilde v. County of Kandiyohi*, 15 F.3d 103 (8th Cir. 1994).

Petitioner Darlene Walters respectfully urges that the payroll method is the only rational method of determining jurisdiction that is consistent with the text, legislative history and underlying public policy of Title VII and with sound judicial policy. The day-by-day method is completely unsupported in the statute's text or history, it engrafts a series of additional unintended and complicated meanings thereon, it is unduly cumbersome to apply and it drastically unsettles the construction of other important statutory schemes.

2. The plain text of the statute supports the payroll method.

Statutory construction begins and ends with the text of a statute if the meaning of that text is clear. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *see also Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2157 (1993). When a statute speaks with clarity, judicial inquiry into its meaning is finished in all but the most extraordinary circumstances. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992).

Petitioner Darlene Walters respectfully submits that the text of Title VII's definition of "employer" is crystal clear under the payroll method and that the task of statutory construction should begin and end with that method.

a. The plain text of the statute specifies that the existence of an employment relationship determines an employee's inclusion in the jurisdictional count.

The plain text of Section 701(b) defines "employer" as a person who "**has** fifteen or more employees **for each working day**" of the requisite number of weeks. (Pet. App. 20a) (emphasis added).

As several of the lower courts adopting the payroll method have noted, the word "**has**" connotes the existence of an employment relationship as determinative of a worker's inclusion within the jurisdictional count. *Thurber v. Jack Reilly's, Inc.* stressed that the statute and its legislative history focused on "the employment relationship," 717 F.2d at 634. *Pedreyra v. Cornell Prescription Pharmacies, Inc.* focused on the liberal construction of the term "employer" needed to fulfill the legislative purpose of eliminating discrimination and concluded that the proper counting method focuses "on the nature of the relationship of the employees." 465 F. Supp. at 941. *Wright v. Kosciusko Medical Clinic, Inc.* followed *Zimmerman*, but criticized it because the statutory definition covers any employee who that employer "has," again focusing on the existence of an employment relationship, not the days worked. 791 F. Supp. at 1331-32.

That focus is all the more emphasized by Title VII's broad definition of "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (Pet. App. 21a). That definition is not limited in any fashion by type of employee, working hours, type of compensation, presence at work or leave status. *Pedreyra*, 465 F. Supp. at 941. (" [S]tatute itself does not limit the definition of employee by the number of hours worked each day.").

The payroll method focuses on just that factor -- the existence of an employment relationship between the employer and the employee.

Thus, as simple as it may seem, the jurisdictional determination can be made by counting the number of

"employees" a "person" "has" "for each working day" of each "calendar week" of a year. If that "person . . . has fifteen or more employees for each working day in each of twenty or more calendar weeks," then that person is an employer and is subject to the jurisdiction of the federal courts under Title VII.

The meaning of the statute's text is plain.

b. Midweek employment changes, a common employment event, give full and complete meaning to the "for each working day" language.

A number of courts have concluded that **only** the day-by-day method gives meaning to the phrase "for each working day." The Seventh Circuit in this case so concluded, ruling that the most natural interpretation of "for each working day" "looks to the number of employees physically present at work on each day of the week." 60 F.3d at 1228 (Pet. App. 6a). The *Zimmerman* court concluded that any other reading rendered that clause "meaningless, redundant, or superfluous." 704 F.2d at 353. *See also Richardson v. Bedford Place Housing Phase I Associates*, 855 F. Supp. 366, 370 (N.D. Ga. 1994) ("Any other interpretation would render the words 'for each working day' superfluous.").

However, petitioner Darlene Walters respectfully submits that the payroll method gives the phrase "for each working day" life and meaning by accounting for the realistic and common situation when an employee enters or leaves employment midweek. Thus, for example, when an employee enters employment on a Tuesday of a Monday to Friday workweek, that employee is not a Title VII employee for that week because he or she is not an employee "for each working day" of that week, not having been an employee on Monday. Similarly, an employee who leaves employment on a Thursday is not a Title

VII employee "for each working day" of that week, having been employed for only four of the five days of that week, not including Friday.

Such midweek employment changes are hardly improbable or isolated occurrences. Given the complexities of the business world and changing employment needs, common sense counsels that midweek employment changes are a regular part of employment patterns. It is surely customary that employees begin and end their employment at the beginning and end of payroll periods, which, for example, are often pegged to the first and last days of a month. The first and last days of such payroll periods -- *e.g.* from October 1st to 15th and October 16th to 31st -- do not always fall on Monday and Friday, as they do not this year.

Moreover, such midweek employment changes are not fanciful. They occurred **nine** times in this case. Ms. Walters was terminated on Monday, April 23, 1990, and thus was not an employee "for each working day" of her last work week, calendar week 17 of 1990. (Week 17 Spreadsheet, JA 44). In eight other weeks, other employees either started or left Metropolitan's employ during midweek, most at the beginning or end of its biweekly payroll period, which began on Friday and ended on Thursday of every other week. (*See* discussion *supra* pp. 10-11). Thus, construing the phrase "for each working day" to account for midweek employment changes gives the statute full meaning.

Nevertheless, without any real explanation, the court of appeals dismissed that construction as "a highly unlikely reading of the statute" because such midweek employment changes "are unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." 60 F.3d at 1228. (Pet. App. 6a). The court's unstated assumption

seems to have been that employees almost always enter employment on Monday and terminate employment on Friday. Whatever the basis, the court's conclusion ignores the facts of this case, theoretical probabilities, and the infinite varieties of employment situations in the complex American employment market.

c. Midweek employment changes were specifically mentioned in the legislative history of the FMLA and appear in the FMLA's implementing regulations.

In fact, contrary to the court of appeals' conclusion, midweek employment changes are of sufficient importance to have merited specific Congressional and regulatory attention in the enactment and administration of a federal anti-discrimination statute.

As noted above, *supra*, p. 16, the FMLA's definition of employer includes precisely the same "for each working day" phrase as Title VII. 29 U.S.C. § 2611(4)(A)(i). (Pet. App. 28a). The House Report on the bill that eventually became the FMLA explicitly mentioned midweek employment changes:

> [A]n employee who begins employment, i.e., is added to the employer's payroll after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will **not** count as being employed on "each working day" of such week.

House Committee on Education and Labor, Family and Medical Leave Act of 1993, H.R. Rep. No. 8, pt. 1, 103d Cong., 1st Sess. at 34 (1993) (emphasis added).

Moreover, the Department of Labor's regulations implementing the FMLA explicitly provide the same

definitional restriction for such midweek employment changes:

> An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

Final Regulations Implementing Family and Medical Leave Act, 60 Fed. Reg. 2179, 2240 (1995) (to be codified at 29 C.F.R. §825.105(d)) (Supp. Pet. App. 2a).

Thus, midweek employment changes are of sufficient importance to be included in a federal anti-discrimination statute and the implementing regulations.

Thus, the court of appeals erred in concluding that only the day-by-day method gives meaning to the phrase "for each working day." In fact, the payroll method gives full meaning to the phrase and recognizes common practical realities of the American employment market.

d. The day-by-day method engrafts complicated additional factors onto the statute not even remotely suggested by the plain text of the phrase "for each working day."

Next, whereas the payroll method is simple in concept and brings no additional gloss or meaning to the definition of employer, the day-by-day method engrafts a complicated set of additional factors onto the phrase "for each working day."

For example, an employee's payroll status becomes an essential inquiry because salaried workers are counted for each working day whether present at work or not. *Zimmerman*, 704 F.2d at 353. Leave status of hourly workers requires

examination because hourly employees are counted only if their leave is paid. *Id.* Indeed, by reserving ruling on the questions raised by the day-by-day method -- how to count "hourly workers on paid leave," how to count "hourly paid workers on non-paid standby status," and how to count "salaried workers" -- even *Zimmerman* recognized that method's inherent additional complexities. 704 F.2d at 354 n. 6.

Therefore, it is difficult to understand how the plain text of the statute invokes a counting method that imports such significant and new concepts and facts into the phrase "for each working day."

e. The structural coherence of Title VII counsels in favor of the payroll method.

Next, the day-by-day method introduces a serious structural inconsistency into Title VII by excluding from the jurisdictional count employees who are explicitly protected by Title VII's prohibitions.

Title VII prohibits discrimination and retaliation against "individuals" and "employees." 42 U.S.C. §§ 2000e-2 & 2000e-3 (Pet. App. 22a-23a). Thus, all employees -- full-time or part-time, salaried or hourly, present or absent -- are protected from discrimination.

"[N]ormal canons of construction caution us to read [a] statute as a whole, and, unless there is good reason, to adopt a consistent interpretation of a term used in more than one place within a statute." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 512 n. 5 (1992); *Gustafson v. Alloyd Co.*, 115 S.Ct. 1061, 1066 (1995) (A term should be construed consistently throughout a statute.). *See also* Recent Case, *Employment Discrimination -- Title VII -- Seventh Circuit Reaffirms a Narrow Definition of "Employer" for the Purposes*

of Title VII, 109 Harv. L. Rev. 675 (1996).

In contrast, the payroll method is consistent and inclusive in counting employees, the workers protected under Title VII, for each working day they are employed.

Moreover, it makes no sense to exclude from the jurisdictional count the very persons whom Title VII was intended to protect. This is especially so when, as petitioner will demonstrate in the next section, those persons comprise an ever increasing proportion of the American workforce.

f. The day-by-day method does not account for the realities of the changing American labor market.

Next, contrary to the payroll method, the day-by-day method encrusts Title VII in a fixed view of the nature of employment in America -- in which workers go to the premises of the employer on Monday to Friday from 9:00 a.m. to 5:00 p.m. In fact, the American work environment is drastically changing so that the work patterns of employees are different than they were thirty years ago when Title VII was enacted. This case presents a snapshot of some of those changes.

First and foremost, women comprise a significant proportion of Metropolitan's workforce. That fact mirrors the economy in general. In 1970, there were 31.5 million women in the civilian labor force -- a participation rate of 43.3 per cent of American women. By 1994, that number had increased to 60.2 million women -- and their participation rate had increased to 58.8 per cent of women. Bureau of Census, *Table No. 627 - Civilian Labor Force and Participation Rates, With Projections: 1970 to 2005*, Statistical Abstract of the United States - 1995 at 405 (September 1995).

From 1960 to 1994, the participation rate of married women, broken down by age groups changed as follows:

Year	16-19	20-24	25-34	35-44	45-64	65+	Total
1960	27.2%	31.7%	28.8%	37.2%	36.0%	6.7%	31.9%
1980	49.3%	61.4%	58.8%	61.8%	46.9%	7.3%	49.8%
1994	48.9%	65.8%	71.6%	75.8%	61.9%	9.4%	60.7%

Id. at p. 405: *Table No. 636 - Labor Force Participation Rates, by Marital Status, Sex and Age: 1960 to 1994.*

Surely, this demonstrates the increased participation in the American workforce by one subset of Title VII's intended beneficiaries.

In addition, this case presents a picture of the changing nature of work schedules in our economy. Metropolitan's employees work flexible schedules with different hours on different days. There is flextime, part-time, and weekend work.

Those case-specific facts are reflected in national workforce statistics. For example, in 1985, the distribution of workers with flexible schedules was 12.3 per cent of a 73.4 million person workforce. By 1991, the distribution had increased to 15.1 per cent of an 80.45 million person workforce. *Id.* at p. 410: *Table No. 647 - Workers on Flexible and Shift Schedules: 1985 and 1991.*

There is no need for a more detailed statistical picture of the changed employment patternns in the American economy because the central point in this regard is a simple one: the construction of Title VII should not be encased in a outdated preconception of the American economy and working conditions. The analysis of the court of appeals in this case, and the day-by-day method in general, have just that undesirable effect. That construction excludes Title VII's

intended beneficiaries from its protections in an era when those beneficiaries are entering the American workforce in droves, a wholly undesirable result.

The payroll method has none of these unfortunate consequences. It looks only to one thing -- employment status -- without any unnecessary or outdated criteria about working conditions. It is flexible enough to cover all workers who enter the workforce. This is the type of flexibility that a remedial anti-discrimination statute should have.

g. The day-by-day method results in irrational distinctions between employees.

Furthermore, the day-by-day method results in irrational and arbitrary distinctions between workers. For example, an hourly worker who works a "regular" workday five days a week, Monday through Friday, is counted on all five days whereas an hourly worker who works longer hours only four days a week, Monday to Thursday, for the same total weekly hours is counted for only those four days. That pattern -- "flextime" -- exists in this case. (*See* discussion *supra*, p. 11).

Another example: the part-time worker who works four weekdays and one weekend day is not counted as an employee for the entire week. That pattern also exists in this case -- M. Finney, a part-time employee, often worked four days during the workweek and then on Saturday. (*See* discussion *supra*, pp. 11-12). In contrast, under both methods, a part-time employee who works only one hour a day all five days of the regular workweek would be counted for the whole week.

Yet another example: Respondent Bieber was a salaried employee and was thus counted for each working day without reference to his presence at work or leave status. (*See* discussion supra, p. 12). There seems to be no principled

reason to treat such salaried employees different from a full-time hourly employee.

Beside their obvious irrationality, these differences are the more suspect because nowhere does the statute mention, or distinguish between, employees on the basis of any of the factors needed to apply the day-by-day method.

h. Conclusion.

For all these reasons, the plain text of the statute requires that the payroll method be used to determine jurisdiction. The resolution of this case should begin and end with that rationale.

3. If Section 701(b) is ambiguous, the legislative history supports the payroll method.

a. Introduction

The distinguished Seventh Circuit panels in this case and in *Zimmerman* reached conclusions directly opposite to that of the distinguished First Circuit panel in *Thurber* which included then Circuit Judge, now Justice, Breyer. 717 F.2d at 633. That conflict is repeated in decisions of other circuit and district courts, several disagreeing about the meaning of the statute's "plain text." (*See* cases cited *supra*, notes 6 & 7, p. 17 & 18). Perhaps that conflict alone suggests that the statute is ambiguous, justifying a look at its legislative history.

Moreover, the court below herein seemed to concede both that the statute was ambiguous and that the legislative history supported the payroll method. At one point, the court "agree[d] that the statute could have been worded more clearly." 60 F.3d at 1228 (Pet. App. 6a). At another point, the court conceded that certain remarks in the legislative debate were consistent

with the payroll method. Yet, the court decided the case on the statute's plain text and concluded that the legislative history of Title VII was "too confused and chaotic to be of much use." 60 F.3d at 1227 n. 3 (Pet. App. 5a). Perhaps these are extraordinary circumstances sufficient to justify examination of the legislative history. *Estate of Cowart*, 112 S. Ct. at 2594 (In plain text case court examines legislative history only in most extraordinary circumstances.).

Petitioner Darlene Walters respectfully submits that the legislative history of the statutory language at issue is crystal clear in focusing on the existence of an employment relationship as determinative of an employee's inclusion in the jurisdictional count. Only the payroll method is true to that legislative history.

b. The 1964 legislative history of the Title VII contains a specific explanation of the purpose and meaning of the phrase "for each working day."

First, there is a specific legislative history about the definition of "employer" and the phrase "for each working day."

That phrase originated in the Senate which was considering a civil rights bill passed by the House of Representatives. The Title VII of that House-passed bill defined employer as a person with twenty-five or more employees, but did not include the "for each working day" language now in the statute. H.R. 7152, 88th Cong., 1st Sess. (1964). That language originated in a Senate substitute for Title VII, was specifically debated on the Senate floor, was approved by a large majority of the Senate, and thereafter survived without change into enactment as law.

Eight years later, Congress reduced the jurisdictional

minimum to the current fifteen, but the neither the text nor the legislative history of that change enlighten the meaning of the phrase "for each working day." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 104-05 (1972).[9]

A brief synopsis of the 1964 Senate deliberations preceding the enactment of Title VII is as follows:

It is an understatement to say that this civil rights legislation was controversial. Once in the Senate it drew the earnest legislative attention of the Senate leaders, Majority Leader Mike Mansfield and Minority Leader Everett McKinley Dirksen.

After the passage of several weeks, Senators Mansfield and Dirksen jointly introduced a compromise substitute to the House Bill. Amendment No. 656 to H.R. 7152 in the Nature of a Substitute, *reprinted in full at* 110 Cong. Rec. 11926 (May 26, 1964). The ensuing Senate debate focused on Amendment

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[9] Both the House and Senate bills that formed the basis of the 1972 amendments proposed to lower the minimum to eight employees. *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 26 (1971), and S. Rep. No. 415, 92 Cong., 1st Sess. 8-9 (1971). In the House that change was stricken entirely. *See* H.R. 1746, 92d Cong., 1st Sess. (1971) as passed by the House on September 17, 1971. The Senate compromised on a minimum of fifteen. *See* Senate debates, 118 Cong. Rec. 3170-72 (February 8, 1972). The Conference then agreed to the fifteen employee minimum. *See* Conference Report, S. Rep. No. 681, 92d Cong. 2d Sess. 15 (1972), and House debates adopting Conference approved bill, 118 Cong. Rec. 7563-73 (March 8, 1972), *esp.* remarks of Congressman Erlenborn at 118 Cong. Rec. 7567. Through all that activity, the meaning of "for each working day" was not discussed.

656, the Mansfield-Dirksen Substitute.

The compromise substitute contained the precise definition of "employer" that ended up in the statute, including the phrase "for each working day." *Id.* at 11930. On June 5, 1964, Senator Dirksen inserted into the Congressional Record an "annotated" copy of the House-passed bill showing the changes proposed by the Substitute. That annotated copy shows the addition of the phrase "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 110 Cong. Rec. 12807, 12812 (June 5, 1964).

On June 9, 1964, Senator Ervin, acting for Title VII's opponents, moved to strike Title VII in its entirety. 110 Cong. Rec. 13073-74 (June 9, 1964); Amendment 898, *reprinted in full at* 110 Cong. Rec. 12924-25 (June 8, 1964). The Senate soundly rejected that effort by a vote of 64 to 33. 110 Cong. Rec. 13085 (June 9, 1964).

Immediately thereafter, Senator Cotton of New Hampshire moved to raise the jurisdictional minimum to one hundred or more employees. Amendment No. 606, *reprinted in full at* 110 Cong. Rec. 11461 (May 20, 1964). See Remarks of Senator Cotton and ensuing debate, 110 Cong. Rec. 13085-93 (June 9, 1964).

In the course of that debate, and in opposition to the Cotton amendment, Minority Leader Dirksen specifically discussed the phrase "for each working day." After stating that he had initially been concerned with the "far-reaching character" of Title VII as contained in the House Bill, he explained that

> [a]ccordingly, the House bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect

> that the definition of the term "employer" would apply to 25 or more **who were employees for each working day**, in each of 20 or more calendar weeks, in the current or preceding calendar year. **We went through that matter with the Department of Labor and others, in order to make sure that we were on good ground.** 110 Cong. Rec. 13087 (1964) (emphasis added).

While Senator Dirksen's remarks were targeted at seasonal employees, the clear implications of what he said go much farther because they explicitly show his intention to focus on the existence of an employment relationship as determinative of the jurisdictional count. To repeat his words more pointedly: "the definition . . . would apply to 25 or more **who were employees on each working day** . . . ." (emphasis added). It is the status of workers as employees that is central, not their presence at work. Indeed, Senator Dirksen's remarks neither mention nor even remotely allude to presence at work.

Moreover, because of the statutory and interpretive history of the Unemployment Compensation Act (UCA), Senator Dirksen's remarks about the UCA and about his consultation with the Department of Labor "and others" even more strongly show his focus on the employment relationship as the determinant of coverage.

In 1964, the UCA's definition of "employer" read as follows: "[T]he term 'employer' does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were **employed by him in employment** for some portion of the day (whether or not at the same moment of time) was four or more." 26 U.S.C. § 3306(a) (1958) (emphasis added).

In 1955, the Internal Revenue Service ("IRS") had construed an earlier version of that definition which differed slightly from the above quoted form in that the minimum number of employees was eight. 26 U.S.C. § 1607(a) (1952).[10] The IRS ruled that a worker is counted as an employee under the UCA for each working day the employment relationship

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[10] The definition was originally enacted in the Social Security Act of 1935 and included the following language ". . . the total number of individuals who were **in his employ** for some portion of the day (whether or not at the same moment of time) was eight or more." Social Security Act of 1935, Pub. L. No. 74-271, Title IX, § 907(a), 49 Stat. 620, 642 (1935) (emphasis added).

In early 1939, the original definition was codified as 26 U.S.C. § 1607(a) as part of the Internal Revenue Code of 1939. Pub. L. No. 76-1, ch. 2, § 1607(a), 53 Stat. 1, 187 (February 10, 1939). Later that year, the language "in his employ" was changed to "employed by him in employment." Social Security Act Amendments of 1939, Pub. L. No. 76-379, title VI, § 614, 53 Stat. 1360, 1392 (August 10, 1939).

In August 1954, the definition was recodified as 26 U.S.C. § 3306(a). Internal Revenue Code of 1954, Pub. L. No. 83-591, ch. 736, 68A Stat. 3, 447 (1954). On September 1, 1954, the definition was amended to reduce the minimum number of employees to four, effective January 1, 1956. An Act to Extend and Improve Unemployment Compensation, Pub. L. No. 83-767, ch. 1212, §1, 68 Stat. 1130 (1954), *codified at* 26 U.S.C. § 3306(a) (Supp. II 1955). That was the form of the definition in 1964 when the Senate adapted it into Title VII.

In 1970, the pertinent part of the definition was amended into its current, slightly different, reconfigured form in which the number of employees was also reduced to one. Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695, 696 (1970), *currently codified at* 26 U.S.C. § 3306(a)(2) (1994).

exists, regardless of whether the employee reports to work each day. Rev. Rul. 55-19, 1955-1 C.B. 496 (1955).

The full text of that IRS Revenue Ruling is included in the Joint Appendix at JA 80 to JA 85. It seems written with the instant case in mind. It dealt explicitly with the "method to be used in arriving at a weekly count of employees for purposes of determining liability of an employer under section 1607(a) of the Federal Unemployment Tax Act (subchapter C, chapter 9, Internal Revenue Code of 1939) under certain conditions, particularly where part-time employees are involved." 1955-1 C.B. 496-97. (JA 80).

As the IRS ruling summarized the matter, neither the method or the frequency of payment, nor an employee's presence at work, nor an employee's "regular," "permanent" or "part-time" status determines the employee's inclusion in the count. Instead: "The existence of an employment relationship is the controlling factor." *Id.* at 498. (JA 83). Thus, explained the IRS, regular employees who are granted a day or two off per week because of long working hours are counted as employees during the entire week because the employer-employee relationship does not terminate on those days off.

> If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week. *Id* at 497. (JA 81).

This Ruling could not be clearer.

Moreover, the explicit language of the UCA through all its changes (from the original "individuals . . . in his employ" to "individuals . . . employed by him in employment," *supra* note 10 p. 35) show the Congressional focus on the employment relationship as the determinant of coverage.

Senator Dirksen and the other drafters of his compromise substitute were specifically aware of the text of the UCA and that long standing IRS ruling. We know this because he as much as said so in his remarks about "taking the language out of the [UCA]" and about consultation with the "Department of Labor and others, in order to make sure that we were on good ground." 110 Cong. Rec. at 13087. At the very least, as the district court in *Cohen v. S.U.P.A. Inc.* concluded, it is appropriate to assume that Congress intended that Title VII's definition be interpreted the same as the UCA's definition on which it was modeled. 814 F. Supp. at 255-56 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979)).

This is the most powerful and persuasive legislative history imaginable -- remarks in floor debate by the Minority Leader of the Senate, a chief co-sponsor of a compromise bill containing language that was eventually enacted into law without change. He spoke directly to the language at issue and his position was supported by a large majority of the Senate. *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.* 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.")).

The power of this legislative history is reflected in the Senate's overwhelming rejection of Senator Cotton's amendment by a vote of 63 to 34. 110 Cong. Rec. 13093 (June 9, 1964). The next day, Senator Dirksen introduced a revised substitute amendment that incorporated other changes made by the Senate but which did not alter his proposed definition of employer. Amendment No. 1052, *reprinted in full at* 110 Cong. Rec. 13310, 13314 (June 10, 1964). Almost immediately thereafter, the Senate voted cloture by a vote of 71-29. 110

Cong. Rec. 13327 (June 10, 1964). On June 17, 1964, the Senate adopted the Mansfield-Dirksen Substitute by a vote of 76-18. 110 Cong. Rec. 14239 (June 17, 1964). On June 19, 1964, the Senate approved the House Bill as amended by the Substitute by a vote of 73-27 and sent it to Conference. 110 Cong. Rec. 14511 (June 19, 1964).

That definition of "employer" was ultimately enacted in the precise form discussed by Senator Dirksen. Pub. L. 88-352, Title VII, § 701(b), 78 Stat. 241, 253 (1964).

Thus, the legislative history of Title VII pointedly and strongly shows the legislative intent to focus on the employment relationship in counting employees toward the jurisdictional minimum. In turn, this requires the use of the payroll method.

4. The day-by-day method is explicitly contrary to the general legislative purposes underlying Title VII -- that of extending Title VII's prohibitions as far as possible without imposing undue expense and burden on small businesses unable to bear that cost.

That Congress intended to limit the reach of Title VII is apparent from the textual definition of employer, limited as it was to twenty-five employees. It is the purpose behind that limitation that bears examination.

Petitioner Darlene Walters respectfully submits that only the payroll method is consistent with the general tenor of Title VII's legislative history showing that Congress intended to reconcile important competing purposes -- extending the protections of Title VII to the broadest possible number of businesses and employees in such a manner as to ensure easy

enforcement, all without imposing its attendant costs on small entities truly unable to withstand those costs financially.

Three legislative concerns emerge from the debates on Title VII. The first and foremost was the threat to the associational rights of small business owners. Senator Cotton argued that for small businesses, "the personal relationship is predominant" and that a small businessman should "be allowed to pick and choose employees congenial to himself." 110 Cong. Rec. 13085-86 (June 9, 1964) (remarks of Senator Cotton). A second theme advanced by Senator Cotton was that small entities should not be burdened with the costs associated with litigating discrimination claims. *Id.* at 13092. His third concern was "the problem of enforcement" -- that if the EEOC was required to investigate every complaint against small businesses across the country "enforcement would become well nigh impossible; and the enforcement which did occur would be found to be spotty." *Id.* at 13085.

The proponents of Title VII argued that it had been molded to reach the largest number of employees and that raising the employee minimum to 100 would emasculate it. *Id.* at 13087 & 10389 (remarks of Senators Dirksen and Humphrey). They argued that the costs of litigating discrimination complaints was justified by the principle of eradicating discrimination, "a price one has to pay to be free." *Id.* at 13092 (remarks of Senator Morse). Finally, they argued that the concerns about enforcement were dealt with by the mechanism of apportioning investigative and conciliative responsibility between the state and federal equal employment agencies. *Id.* at 13087 & 13089 (remarks of Senators Dirksen and Saltonstall).

Of course, Senator Cotton lost. The Senate overwhelmingly rejected his concerns about the personal relationship, problems of enforcement and the costs of defense.

And, of course, " '[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.' " *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981), (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)).

Yet, reference to Senator Cotton's concerns is useful because they show that it is the day-by-day method that fulfills all his worse fears and objections. Indeed, as petitioner will demonstrate in the next section, the day-by-day method flushes the specter of Senator Cotton's parade of horribles with new life contrary to the explicit wishes of the great majority of Senators who approved Title VII.

5. Whereas the payroll method is quick and easy to apply, the day-by-day method is difficult, cumbersome and time-consuming and results in irrational distinctions between employees.

a. The payroll method is easy and swift of application.

The payroll method is quick and easy to apply.

In this case, Metropolitan prepared biweekly payroll records for its employees which it sent to an outside payroll service for processing. Examples of Metropolitan's payroll records are included in the Joint Appendix at JA 13A & 14A. They are simple and easy to read. They show that Metropolitan employed fifteen employees for the payroll period ending March 9, 1990, a Thursday. *Id.* It takes seconds to count the fifteen employees. With the payroll registers for the other weeks of the year, the count of employees consumes no more than a couple of hours, even though Metropolitan's payroll period did not coincide with the calendar week. No further agonizing tabulations or counts are required.

In general, the payroll method will be easy to apply in virtually all cases. The jurisdictional count can be made quickly, based on regular payroll records, already required by the income, payroll, unemployment and social security tax reporting and withholding obligations imposed on employers by federal, and most state, tax laws.

b. The day-by-day method is a morass.

This Court has received this case with a streamlined record, based in large measure on simple stipulations. Central to those stipulations are the attractive spreadsheets in shaded columnar format showing the work history of every one of Metropolitan's employees in 1990. (Stips. JA 28-79). The ready format of these spreadsheets should not conceal the difficulties of the day-by-day method. In fact, the work required by the day-by-day method was excruciating.

To reach those Stipulations, the parties were required to examine daily time cards and other payroll records for between thirteen and seventeen full-time and part-time hourly employees for every day of 1990 to determine their employee status (full-time or part-time), presence at work, leave status (paid or unpaid) and the other cumbersome attributes emphasized by the day-by day method.

In theory, the minimum jurisdictional threshold for one year requires examination of 1500 daily working histories (15 employees times 5 working days per week times 20 weeks). In a case like this one, in which the jurisdictional count was short, there would necessarily be a tabulation for the entire year of daily working histories -- a total of 3900 records (15 employees times 5 weekly working days times 52 weeks). In this case, for various additional reasons, the parties examined the work history of every employee for every day of the year, including

weekends -- approximately 5400 daily working histories.

All those figures are doubled because tabulation of two years of working history will often be required. In fact, in this case, respondents did a two year analysis -- 1989 and 1990 -- and produced their own spreadsheet weekly tabulations for both years, tabulations that proved to be significantly incorrect. (*See* discussion supra, notes 4 & 5, pp. 6 & 8). Thus, respondents and their counsel were required to do their own detailed tabulations and then redo them all over again to reach the stipulations. Surely that repetitious work and the resulting delays and expense were as undesirable for respondents as they were for petitioners and the district court.

Moreover, the detailed analysis required by the day-by-day method involves a series of complicated and sometimes raw and indecipherable records -- time cards, payroll sheets, and sick leave and vacation records.

Finally, even though the analysis was undertaken by agreement of counsel working together to produce usable stipulations for the district court, the effort still took almost ten months, from the August 13, 1993 filing of Metropolitan's Motion to Dismiss until the June 6, 1994 filing of the Stipulations. (*See* Dist. Ct. Dkt. Entries Nos. 25 & 37, JA 2 & 4-5). The parties repeatedly requested and were granted extensions of time by the district court. (*See* Dist. Ct. Dkt. Entries Nos. 32-36, JA 3-4). Had the parties contested the jurisdictional count, thus requiring the trial court's resolution of factual issues about daily work histories, the case would no doubt have been delayed even longer perhaps embroiling the district court in an agonizing and overwhelming counting exercise. With the increasing caseloads in the EEOC and federal courts, the imposition of such inordinate analysis is unwise in the extreme.

A line must be drawn somewhere. Some sort of test or method of counting must be devised. The payroll test is the obvious choice because it fulfills the clear legislative purpose of maximizing Title VII's protections in an inexpensive, swift procedure that is easy to apply.

c. The day-by-day method imposes greater costs on respondent employers because of the fee shifting provisions of Title VII.

Moreover, in some percentage of the cases, it will be the employer defendants who will bear the total burden of inordinate cost.

Prevailing plaintiffs are entitled to recover attorneys' fees and costs from defendants in all but special circumstances, whereas a prevailing defendant only recovers fees if the Title VII plaintiff's action was frivolous, unreasonable or without foundation or brought in bad faith. 42 U.S.C. § 2000e-5(k); *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 423 (1978). Thus, in those cases where jurisdiction is found and the plaintiff prevails on the merits, a defendant will pay the plaintiff's fees incurred in establishing that jurisdiction, whereas a prevailing defendant will be required to meet more stringent standards to win fees from a losing plaintiff. *Compare Pedreyra*, 465 F. Supp. at 952 (plaintiff establishing jurisdiction and discrimination entitled to attorneys fees), *with Evans v. Davie Truckers, Inc.*, 769 F.2d at 1014 (affirming refusal to award fees to defendant who won on merits after being found to be an employer).

Of course, respondent employers would no doubt prefer to escape a Title VII action on jurisdictional grounds rather than litigate on the merits. But surely respondent employers desire

an efficient and inexpensive method of determining whether or not they are covered by Title VII in the first place, and whether they are within the jurisdiction of the EEOC and federal courts in the second. But most assuredly, respondent employer do not want to lose an expensive and protracted jurisdictional inquiry, only to pay the costs and fees incurred by the plaintiff in that inquiry when and if the plaintiff thereafter prevails on the merits.

Thus, the day-by-day test results in an unbalanced apportionment of costs, a totally undesirable consequence from the defendant's perspective, a consequence that does not exist under the easy and swift payroll method.

6. The day-by-day method unsettles the construction of closely related anti-discrimination schemes which contain precisely the same phrase "for each working day."

As noted above, the phrase "for each working day" is contained in three other federal anti-discrimination statutes. ADEA, 29 U.S.C. § 630(b) (1988 & Supp. V 1993) (Pet. App. 24a), FMLA, 29 U.S.C. § 2611(4)(A)(i) (Supp. V 1993) (Pet. App. 28a), and ADA, 42 U.S.C. § 12111(5)(A) (Supp. V 1993). *See* discussion *supra*, pp. 16-17.

In the case of the FMLA, the most recently enacted of those statutes, Congress explicitly stated its intention that "for each working day" be construed under the payroll method. Both the House and Senate Committee Reports quote the "for each working day" language from Title VII, and then explain that as included in the FMLA the phrase "is intended to mean 'employ' in the sense of maintain on the payroll." House Committee on Education and Labor, Family and Medical Leave

Act of 1993, H.R. Rep. No. 8, pt. 1, 103d Cong., 1st Sess. at 33 (1993); and S. Rep. 103-3, 103d Cong., 1st Sess. at 21-22 (1993) *reprinted in* 1993 U.S.C.C.A.N. 23-24.

Moreover, the Department of Labor has explicitly included that method in its regulations implementing the FMLA: "Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week." Final Regulations Implementing Family and Medical Leave Act, 60 Fed. Reg. 2179, 2240 (1995) (to be codified at 29 C.F.R. Part 825, § 825.105(b)). (Supp. Pet. App. 1a-2a) As noted above, those regulations also explicitly recognize midweek employment changes as reflective of the payroll method. (*See* Argument Section 2.c *supra* p. 24-25).

It is difficult to see how the courts could construe the FMLA under the day-by-day method given its explicit legislative history and administrative construction. If Title VII is construed in this case under the day-by-day method, the lower courts, the EEOC, employees and employers will be faced with a senseless difference between identical statutory definitions in closely related anti-discrimination schemes.

The court of appeals refused to deal with this looming conflict on the grounds that while subsequent Congressional action can justify abandoning statutory precedent, the FMLA legislative history was just that -- legislative history -- and was "not akin to legislative action," and because the FMLA was not involved in this case. 60 F.3d at 1228-30 (Pet. App. at 8a-9a & 11a).

That rationale is wholly unsatisfactory. It is difficult to understand how Congress could have taken any other course in

enacting the FMLA. Congress obviously concluded that the phrase "for each working day" required the payroll method of implementation. It said so in its Reports. Had it altered that phrase in the FMLA, for example, to specify that it applied "to all employees on the payroll irrespective of their presence at work," that change would have been construed as a concession that Title VII and the ADEA did not require the payroll method because that additional clarifying language is not in those statutes. Thus, Congress chose the only principled method of ensuring uniformity of construction of identical language in similar statutory schemes -- clarification in the legislative history.

"[A] principle of statutory construction can endure just so many legislative revisitations . . . ." *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). Where subsequent developments in the law -- either through the growth of judicial doctrine or further action by Congress -- have removed or weakened the conceptual underpinnings of a prior rule, or rendered it irreconcilable with competing legal doctrines or policies, its abandonment is fully justified. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

All those factors are present here: There is a strong line of court decisions adopting the payroll method; Congress has explicitly approved that method in a subsequent act; and the adoption of the day-by-day would drastically unsettle the construction of other statutory schemes with consequent confusion for all touched by those schemes. Simply by adopting the payroll method, this Court can bring "coherence and consistency" to this important area of the law, avoiding

future complications arising from statutory conflict.[11] *Id.*

7. The day-by-day method strongly detracts from Title VII's purpose of extending the prohibitions against employment discrimination as far as possible.

Finally, petitioner respectfully submits that the day-by-day method is contrary to the Congressional purpose of extending the prohibitions against employment discrimination as far as possible. That purpose rings out clearly from the text of the statute's prohibitions, discussed above, as well as from the 1964 Senate debates preceding Title VII's enactment (*See* Argument, Section 3, *supra*, p. 31-38), and from the 1972 reduction of the employee minimum to fifteen. (*See* Argument, Section 3.b, *supra*, p. 31-32 and accompanying note 9). This Court affirmed that purpose in a slightly different statutory context in *Griggs v. Duke Power Co.* 401 U.S. 424, 429-30 (1970) (Objective of Congress in enacting Title VII is plain from the language of the statute -- to achieve equality of employment opportunity and remove barriers based on impermissible categories.).

Three of the persuasive lower court decisions adopting the payroll method stress that as remedial legislation, Title VII

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[11] The distracting potential for cases presenting the construction of the phrase is typified by this Court's visitation and revisitation of the task of defining the term "employee" in other federal statutes. *Compare Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992) (ERISA); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (Copyright Act); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (National Labor Relations Act). *See also Holly Farms Corp. v. NLRB*, 64 U.S.L.W. 4269 (April 23, 1996) (National Labor Relations Act).

should be given the broadest possible interpretation consistent with its humanitarian purpose. *Thurber*, 717 F.2d at 634-35; *Pedreyra*, 465 F. Supp. at 941; and *Pascutoi*, 11 FEP Cases at 1326-27. *See also Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (Remedial civil rights laws should be construed generously to further their primary purpose.) Yet, the day-by-day method substantially derogates that purpose by limiting the reach of Title VII's prohibitions.

This case involves allegations that Ms. Walters was denied a promotion because of her gender -- a serious charge to be sure. But even graver is the charge that respondents fired Ms. Walters in retaliation for her original EEOC filing of that discrimination charge. The day-by-day method provides the escape route from responsibility for those serious charges, frustrating Title VII's overriding purpose. To combat such shenanigans in the workplace, the reach of Title VII should be extended as far as possible.

In *EEOC v. Commercial Office Products Co.*, another Title VII case, this Court held that it "need not and should not countenance" " 'absurd or futile results . . . 'plainly at variance with the policy of the legislation as a whole' " 486 U.S. 107, 120-21 (1988) (quoting in part *United States v. American Trucking Assns.*, 310 U.S. 534, 543 (1940) and *Ozawa v. United States*, 260 U.S. 178, 194 (1922)). That longstanding canon of construction should apply here as well. The day-by-day method's absurd and futile results are plainly a variance with Title VII's policy and should not be countenanced.

8. Petitioner Walters adopts the deference arguments of petitioner EEOC.

Finally, petitioner Darlene Walters urges the Court to follow the arguments of the EEOC requiring judicial deference to the EEOC's interpretation of Section 701(b), and adopts those arguments as her own.

CONCLUSION

Petitioner Darlene Walters respectfully asks this Court to reverse the judgement of the Seventh Circuit, to find that Metropolitan was an employer within the meaning of Section 701(b) of the Title VII of the Civil Rights Act of 1964, and to remand this case to the lower courts for full proceedings on the merits.

Respectfully submitted,

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Nos. 95-779 and 95-259

In the Supreme Court of the United States

OCTOBER TERM, 1995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER

DARLENE WALTERS, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

The prohibition against employment discrimination based on an individual's race, color, religion, sex, or national origin, set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, applies to any person who is "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year," 42 U.S.C. 2000e(b). The question presented is:

Whether an hourly paid employee who has an ongoing employment relationship with a person, as reflected by the employee's inclusion on the person's payroll, is counted as an employee of that person for purposes of Section 2000e(b) on days when the employee is not at work or on paid leave.

PARTIES TO THE PROCEEDINGS

The Equal Employment Opportunity Commission (EEOC) and Darlene Walters were appellants in the proceeding below. The EEOC is petitioner in *EEOC* v. *Metropolitan Educational Enterprises, Inc.*, No. 95-779, and Darlene Walters is petitioner in *Walters* v. *Metropolitan Educational Enterprises, Inc.*, No. 95-259. The Court granted the petitions for a writ of certiorari in the two cases at the same time and consolidated the cases. 116 S. Ct. 1260 (1996).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-779

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER

No. 95-259

DARLENE WALTERS, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (95-259 Pet. App. 1a-12a) is reported at 60 F.3d 1225. The opinion of the district court (95-259 Pet. App. 13a-19a) is reported at 864 F. Supp. 71.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1995. Petitioner Walters filed a petition for a writ of certiorari on August 14, 1995. *Walters* v. *Metropolitan Educational Enterprises, Inc.*, No. 95-259.

On October 10, 1995, Justice Stevens extended the time for petitioner the Equal Employment Opportunity Commission (EEOC) to file a petition for a writ of certiorari to and including November 15, 1995. The EEOC filed the petition for a writ of certiorari on November 15, 1995. On March 18, 1996, the Court granted the petitions for a writ of certiorari and consolidated the cases. 116 S. Ct. 1260. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, provides, in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service * * *, or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation * * *, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. 2000e(b).

Other pertinent provisions of Title VII, the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, are reprinted at 95-259 Pet. App. 20a-29a.

STATEMENT

1. Respondent Metropolitan Educational Enterprises, Inc. (Metropolitan), sells and finances the sale of encyclopedias, dictionaries, and other educational materials to retail customers throughout the United States. J.A. 17. Darlene Walters, petitioner in *Walters* v. *Metropolitan Educational Enterprises, Inc.*, No. 95-259,[1] was employed as a payment collector by Metropolitan from January 3, 1986, through April, 1990. R. 12, at 2.[2] Walters filed a charge with petitioner Equal Employment Opportunity Commission (EEOC) in April, 1990, alleging that respondents had discriminated against her on account of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, when they failed to promote her in September, 1989. See R. 12, at 2-3; J.A. 20-21.

Respondents received notice of Walters' discrimination claim in April, 1990. They discharged her shortly thereafter. R. 12, at 3-4. Walters alleges that she was discharged because she refused to comply with respondents' demand that she withdraw her discrimination claim. *Ibid.*

2. On April 7, 1993, petitioner EEOC filed suit against respondents Metropolitan and Leonard Bieber, the president and sole shareholder of Metropol-

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[1] Petitioner EEOC and Walters each petitioned the Court to grant a writ of certiorari to review the judgment of the court of appeals. The Court consolidated the cases when it granted the petitions. 116 S. Ct. 1260 (1996).

[2] "R. #" designates the number of the record document as listed on the district court docket sheet, and is followed, where appropriate, by the page number referenced in that document.

itan, in the United States District Court for the Northern District of Illinois, pursuant to its authority to enforce Title VII, as set forth in Section 706(f)(1) of the Act, 42 U.S.C. 2000e-5(f)(1). R. 1, at 2. The EEOC alleged that respondents had engaged in unlawful employment discrimination in violation of Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), in that respondents discharged Walters in retaliation for her having filed her sex discrimination charge with the EEOC. 95-259 Pet. App. 2a. Walters intervened as a plaintiff, alleging that respondents had discriminated against her on account of sex when they failed to promote her, in violation of Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a), and had retaliated against her for having filed her discrimination charge, in violation of Title VII, 42 U.S.C. 2000e-3(a). Walters also made pendent state claims of retaliatory discharge and breach of contract. See R. 9; R. 12, at 2-5.

On August 13, 1993, respondents filed a motion to dismiss for lack of subject matter jurisdiction, claiming that Metropolitan was not an employer within the meaning of Title VII. That statute defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. 2000e(b); see 95-259 Pet. App. 2a; R. 25, 26. Respondents contended that Metropolitan, and its agent Bieber, had fewer than the threshold number of employees to trigger statutory coverage because employees who were paid on an hourly basis were to be counted only on days when they were either working or on paid leave. R. 26, at 3-4, citing *Norman* v. *Levy*, 767 F. Supp. 1441,

1449 (N.D. Ill. 1991). Respondents argued that, because respondent Bieber was the company's only non-hourly, salaried employee and there were not at least 14 hourly paid employees either at work or on paid leave for each working day in 20 calendar weeks in 1989 or 1990, Metropolitan was not an "employer" covered by Title VII. R. 26, at 4-5. Respondents submitted two affidavits and more than 50 charts in support of their motion. R. 25, 26.

Petitioners sought respondents' records and information regarding their methods of employee timekeeping. R. 31, at 2 & n.2; 95-259 Pet. App. 2a-3a. After months of discovery (limited by the court to the jurisdictional issue), petitioners determined that the time cards and redacted records produced by respondents did not include all the information relevant to determining the number of employees who were on paid leave for vacation, sick leave, or personal days on regular work days. R. 31. On March 4, 1994, Walters moved to compel further discovery. *Ibid.* The court granted the motion and respondents produced additional documents. Petitioners also conducted two depositions of respondents' witnesses relevant to calculating the number of employees. R. 22, at 1-3. The parties then engaged in discussions regarding appropriate stipulations and compilations of data from time cards, work diaries, registers, and other timekeeping records. The parties' stipulations were filed with the court on June 6, 1994. J.A. 17-79. These included 52 charts summarizing the daily attendance or leave status of each of respondents' employees for every day in calendar year 1990.[3]

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[3] Based on the EEOC's allegation of retaliatory discharge occurring in April, 1990, the relevant calendar years for pur-

The stipulated charts revealed that, during 1990, Metropolitan maintained on its payroll one salaried employee (respondent Bieber) and between 13 and 17 hourly paid employees, at least two of whom worked part-time schedules. J.A. 23, 28-79. The parties stipulated that two regular, part-time employees "did not work on each working day of each week in 1990, but they were each employed by [respondents] and on [respondents'] payroll during each week of calendar year 1990." J.A. 23. The parties also stipulated that, in 1990, Metropolitan had 15 or more employees on its payroll during 47 calendar weeks, but had 15 or more employees working or on paid leave on each working day in only nine calendar weeks. 95-259 Pet. App. 15a; J.A. 23-25.

Petitioners filed memoranda opposing respondents' motion to dismiss. R. 38, 39. Petitioner EEOC contended that the court should follow the approach adopted by most other courts and count the number of employees on respondents' payroll, rather than counting hourly paid workers only if they were at work or on paid leave on a particular day. R. 38, at 2. Petitioners conceded that, under respondents' method of counting, the court would lack jurisdiction, *ibid.*; R. 39, and that respondents' position was supported by controlling circuit precedent, *Zimmerman* v. *North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983). R. 38, at 2-3.[4] Petitioners urged the court to modify the method of counting adopted in *Zimmerman* and to adopt the payroll interpretation of Section 2000e(b) reached by other courts and supported by legislative history and principles of statutory construction. R. 38, at 8-12, citing, *inter alia*, EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311-N:3316 (Apr. 20, 1990) (EEOC Policy Guidance) (*reprinted at* 95-259 Pet. App. 30a-40a), and 2A N. Singer, *Sutherland's Statutory Construction* § 46.07 (1984).

The district court granted respondents' motion to dismiss. 95-259 Pet. App. 13a-19a. The court concluded that it could not modify Seventh Circuit precedent, *id.* at 17a, and therefore applied the definition adopted in *Zimmerman*. It held that "hourly and part-time workers are considered employees * * * only on days when they are either physically present at work or on paid leave." *Id.* at 16a, citing *Zimmerman*, 704 F.2d at 353. In light of the parties' stipulation "that

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poses of Section 2000e(b) were 1990 and 1989. The parties agreed that, in 1989, respondents did not have 15 or more employees for the required length of time, regardless of the method used to count the number of employees. J.A. 26; see R. 38, at 3 n.3. The parties also stipulated that Metropolitan's sales force is comprised entirely of "dealer's representatives," with at least 20 such representatives working in 1989 and 1990. The dealer's representatives are not employees of Metropolitan, but work as independent contractors. See J.A. 17-19. They are therefore not included in employee counts for purposes of determining Title VII coverage. The parties stipulated that all other individuals employed by respondents during 1990 were employees for purposes of Section 701(f) of Title VII, 42 U.S.C. 2000e(f). J.A. 22-23.

[4] In *Zimmerman*, the court of appeals applied respondents' interpretation to the essentially identical provision in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 630(b), which defines "employer" to mean "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. 630(b).

there were fifteen employees either present at work or on paid leave each day of the working week for only nine weeks of 1990," the court concluded that Metropolitan was not an "employer" covered by Title VII and dismissed petitioner's suit for lack of subject matter jurisdiction. *Id.* at 18a, 19a.

3. The court of appeals affirmed. 95-259 Pet. App. 1a-12a. The court endorsed the *Zimmerman* reading of Section 2000e(b) as necessary to give meaning to the words "for each working day." It believed that "the most natural interpretation of that phrase looks to the number of employees physically at work on each day of the week." 95-259 Pet. App. 6a. The court conceded that petitioners' alternative payroll interpretation gave meaning to those words as well, but dismissed that interpretation as "highly unlikely," because instances where employees begin or depart work mid-week are "unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." *Ibid.* The court observed that "the statute could have been worded more clearly," but believed "that the *Zimmerman* court's interpretation of its plain text has stood the test of time and a new set of appellate eyes." *Ibid.*

The court of appeals recognized that Congress had recently used substantially similar language to define "employer" when it enacted the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*[5]

[5] The FMLA defines "employer" to mean

> any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

29 U.S.C. 2611(4)(A)(i).

It acknowledged that the Senate Report accompanying the FMLA "endorsed the payroll method over the *Zimmerman* alternative," but believed that had little consequence in this Title VII case. 95-259 Pet. App. 5a, 7a-9a. The court also acknowledged a circuit split regarding the correct meaning of Section 2000e(b).[6]

[6] The First and Fifth Circuits and a number of district courts have adopted the EEOC's payroll method. See 95-259 Pet. App. 9a-10a & n.5, citing, *e.g.*, *Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d 633, 634-635 (1st Cir. 1983), cert. denied, 466 U.S. 904 (1984); *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980); *Reith* v. *Swenson*, 63 Fair Empl. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993); *Cohen* v. *S.U.P.A. Inc.*, 814 F. Supp. 251, 254-256 (N.D.N.Y. 1993); *Vano* v. *Au*, Civ. A. No. 91-0038-H, 1992 WL 175498, at *2 (W.D. Va. July 16, 1992); *Gorman* v. *North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987); *Evans* v. *Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553, 1554 (M.D.N.C. 1984), aff'd, 769 F.2d 1012 (4th Cir. 1985); *Lynn* v. *JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983); *Hornick* v. *Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980); *Pedreyra* v. *Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979). See also *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67, 69-70 (1st Cir. 1995); *Edwards* v. *Esau Investments, Inc.*, Civ. A. No. 93-4130-DES, 1994 WL 606073, at *3-*5 (D. Kan. Oct. 31, 1994).

The Eighth Circuit and several district courts have followed *Zimmerman*. See 95-259 Pet. App. 10a & n.6, citing, *e.g.*, *EEOC* v. *Garden & Assocs., Ltd.*, 956 F.2d 842 (8th Cir. 1992); *McGraw* v. *Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983); *Richardson* v. *Bedford Place Housing Phase I Assocs.*, 855 F. Supp. 366 (N.D. Ga. 1994); *Wright* v. *Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) (applying *Zimmerman* rule as binding precedent, but criticizing interpretation and "urg[ing] its reconsideration"); *Lord* v. *Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Me. 1992) (adopting *Zimmerman* rule without citation to contrary binding First Circuit authority in *Thurber*); *Norman* v. *Levy*, 756 F. Supp.

The court adhered to the *Zimmerman* interpretation because it believed that Congress had not resolved the conflict in favor of either interpretation. 95-259 Pet. App. 8a-9a. The court recognized that the EEOC had rejected the *Zimmerman* method and had endorsed the payroll interpretation of Section 2000e(b), *id.* at 10a, citing EEOC Policy Guidance. It refused to defer to that interpretation because the EEOC policy guidance "was promulgated well after [the Seventh Circuit's] decision in *Zimmerman*," and because the "judiciary, not administrative agencies, is the final arbiter of statutory construction." *Ibid.*, citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).[7]

In a concurring opinion, Judge Ripple observed that "the correctness of [*Zimmerman*] is not free from doubt," but concluded, "with some reluctance, that the EEOC has not made a sufficiently strong case to

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1060, 1063-1064 (N.D. Ill. 1990) (following *Zimmerman* as binding precedent); *EEOC* v. *Argent Industries, Inc.*, 746 F. Supp. 705, 708-709 (S.D. Ohio 1989); *Schoenbaum* v. *Orange County Center for Performing Arts, Inc.*, 677 F. Supp. 1036, 1039 (C.D. Cal. 1987); see also *Hoekel* v. *Plumbing Planning Corp.*, 20 F.3d 839, 840 (8th Cir.), cert. denied, 115 S. Ct. 448 (1994); *Goudeau* v. *Dental Health Services, Inc.*, 901 F. Supp. 1139, 1143-1144 (M.D. La. 1995) (following *Zimmerman* notwithstanding Fifth Circuit dicta endorsing payroll method in *Dumas*).

[7] The court of appeals also rejected arguments that the *Zimmerman* method would eventually yield inconsistent interpretations of substantially similar statutory language, that it presents a greater opportunity for employers to evade statutory coverage by manipulating work schedules, and that it entails a burdensome coverage inquiry that could be avoided by adopting the EEOC's comparatively simple payroll method. 95-259 Pet. App. 11a.

warrant our overruling established [circuit] precedent of long standing." Pet. App. 11a-12a.

SUMMARY OF ARGUMENT

Title VII's prohibition against employment discrimination based on an individual's race, color, religion, sex, or national origin, 42 U.S.C. 2000e *et seq.*, applies to any employer who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 2000e(b). This statutory language is correctly interpreted to include employers who have an employment relationship with the requisite number of employees for the relevant days, regardless of the daily work schedules of the individual employees. The Equal Employment Opportunity Commission (EEOC), the federal agency charged by Congress with primary administrative and enforcement responsibilities under Title VII, determines the number of employees that an employer has on a particular day by counting the number of employees on that employer's payroll for that day. The EEOC views "[t]he payroll [as] a reliable indicator of those individuals who have an employment relationship with the employer." 95-259 Pet. App. 39a. The text and structure of Title VII support this interpretation.

The purpose of Section 2000e(b) also supports the "payroll" method of determining whether an employer is covered. The coverage provision involved in this case was adopted to address concerns that Title VII not extend to employers of seasonal agricultural workers and small resort employers who employ a large number of employees for short periods of time each year. The legislative record makes clear that

the term "employer" otherwise should be given its ordinary meaning so that a person is considered to be the employer of all the employees with whom the person has an employment relationship at a particular time, regardless of the employees' individual work schedules.

To the extent that Title VII's coverage provision is ambiguous, the Court should defer to the interpretation adopted by the EEOC. The EEOC first adopted its payroll method for determining Title VII coverage in 1965—virtually contemporaneously with the initial enactment of Title VII. The EEOC applies the same interpretation to the essentially identical coverage provision in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(b), a statute that expressly delegates to the EEOC the authority to issue interpretive regulations.

ARGUMENT

THE PROHIBITION AGAINST EMPLOYMENT DISCRIMINATION IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. 2000e *ET SEQ.*, APPLIES TO AN EMPLOYER WHO HAS AN EMPLOYMENT RELATIONSHIP WITH 15 OR MORE EMPLOYEES, INDICATED BY THE INCLUSION OF THAT NUMBER OF EMPLOYEES ON THE EMPLOYER'S PAYROLL FOR EACH WORKING DAY IN 20 OR MORE WEEKS IN THE RELEVANT CALENDAR YEAR

A. The Text And Structure Of Title VII Support The Payroll Approach

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employers, employment agencies, and labor organizations from discriminating in employment decisions on the basis of race, color,

religion, sex, or national origin. 42 U.S.C. 2000e-2(a), (b), and (c). Congress defined "employer," for purposes of Title VII, to mean, in relevant part,

> a person engaged in an industry affecting commerce *who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year*, and any agent of such a person.

42 U.S.C. 2000e(b) (emphasis added).[8]

The verb "has," in the context of Section 2000e(b), is most naturally read to mean that the person engaged in commerce stands in an employment relationship with the employees. See *Webster's Third New International Dictionary* 1039 (1986) (def. 3(a): defining "have" to mean "to stand in any of several personal relationships to"; providing as examples: "as father to son, host to guest, friend to friend"); *The Random House Dictionary of the English Language* 877 (2d ed. 1987) (def. 7: defining "have" to mean to "be in a certain relation to"; providing as examples: "She has three cousins. He has a kind boss."). The number of employees an employer "has" at a particular time, for purposes of Title VII, is thus the number of

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[8] Congress defined "person," for purposes of Title VII, to

> includ[e] one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

42 U.S.C. 2000e(a).

Congress defined "employee," for purposes of Title VII, to mean "an individual employed by an employer." 42 U.S.C. 2000e(f).

employees who are in an employment relationship with the employer at that time.

In order to determine the number of employees that are in an employment relationship with an employer on a particular day for purposes of Section 2000e(b), petitioner Equal Employment Opportunity Commission (EEOC) counts the number of salaried and hourly paid employees on the employer's payroll for that day. The EEOC views "[t]he payroll [a]s a reliable indicator of those individuals who have an employment relationship with the employer." EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311-N:3316 (Apr. 20, 1990) (EEOC Policy Guidance) (*reprinted at* 95-259 Pet. App. 30a-40a). The payroll method of identifying an employer's employees is completely consistent with both common sense and everyday usage.

Numerous lower federal courts have adopted that interpretation of Section 2000e(b). See note 6, *supra*. The First Circuit recognizes that an employee should be counted "for each day that an employment relationship exists." *Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1983), cert. denied, 466 U.S. 904 (1984); see also *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67, 69-70 (1st Cir. 1995). The Fifth Circuit has applied the same approach. *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (1980), quoting B. Schlei & P. Grossman, *Employment Discrimination Law* 837-838 (1976) (to determine employer status under Title VII, "one looks to each of the 'working days' within the calendar weeks reviewed to see whether there were 15 or more individuals who were on the payroll regardless of whether they were actually

working full time or on any particular day"), and citing *Pascutoi* v. *Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cases (BNA) 1325 (D. Minn. 1975); see also *Edwards* v. *Esau Investments, Inc.*, Civ. A. No. 93-4130-DES, 1994 WL 606073, at *4 (D. Kan. Oct. 31, 1994) (payroll method "is meant to recognize the existence of regular employer-employee relationships"); *Reith* v. *Swenson*, 63 Fair Empl. Prac. Cas. (BNA) 885, 895 (D. Kan. 1993) ("As long as the worker is regularly employed, and expected to return, the worker is subject to the effects of possible discrimination in the work place and should be counted as an employee."); *Lynn* v. *JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983); *Hornick* v. *Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980); *Pedreyra* v. *Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979) (proper focus when counting employees is "nature of the relationship" of employees to the business "and not on the number of hours worked each day").

The payroll method reflects an interpretation of the "employer" coverage provision that is consistent with the general rule of construction for civil rights statutes. Such statutes are remedial in nature and should be construed broadly to effectuate the statutory purpose. See *Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d at 635 ("[T]he prevailing majority in Congress intended to give [Title VII] broad effect."), citing 110 Cong. Rec. 13,087-13,093 (1964) (comments of Senators Morse, Saltonstall, and others); see also *Virgo* v. *Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994) (consistent with purposes of Title VII, term "employer" should be interpreted liberally); *Trevino* v. *Celanese Corp.*, 701 F.2d 397, 403 (5th Cir. 1983) (same); *Owens* v. *Rush*, 636 F.2d 283, 287 (10th

Cir. 1980) (to effectuate statute's humanitarian policies, liberal construction is generally given "employer" definition under Title VII); *Baker* v. *Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977) (same).

Interpreting Section 2000e(b) to cover employers that have 15 or more employees on their payroll for the relevant number of days, regardless of the individual employees' particular payment status (hourly paid versus salaried) or work schedules, best furthers the purpose of Title VII. Title VII was enacted to remedy the long history of employment discrimination against African Americans and women. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 16-18 (1963); 110 Cong. Rec. 2577-2584, 2718-2721 (1964). The payroll interpretation furthers that purpose by counting all employees equally based on the existence of an employment relationship, without distinctions based on payment status. The court of appeals' interpretation, on the other hand, excludes from the employment count hourly paid employees (but not salaried employees) for days on which they do not work (and are not on paid leave). See pages 17-19, *infra*. Excluding hourly paid employees from the employee count disproportionately excludes women and black employees. Data from the Current Population Survey of the Bureau of Labor Statistics, U.S. Dep't of Labor, show that of the wage and salary workers in the United States in 1995, 62.1% of the total workers were paid hourly. Of the female workers, 64.8% were paid hourly, whereas 59.7% of the male workers were paid hourly. Of the black workers, 70.8% were paid hourly, whereas 60.9% of the white workers were paid hourly. The court of appeals' interpretation therefore would disproportionately

exclude from Title VII's coverage employers who employ substantial numbers of the employees whom Title VII was primarily designed to protect.

2. The court of appeals interpreted Section 2000e(b) to require that hourly paid employees be excluded from the employee count "on days when they were neither working nor on paid leave." 95-259 Pet. App. 4a, 5a-6a, citing *Zimmerman* v. *North American Signal Co.*, 704 F.2d 347, 353-354 (7th Cir. 1983). That interpretation categorically excludes hourly paid employees from the employee count under Section 2000e(b) in at least four circumstances: when an hourly paid employee takes leave without pay for a particular day; when an hourly paid, part-time employee does not work a particular day;[9] when an hourly paid, full-time employee has a flex-time or compressed schedule that permits the employee to work longer hours on certain days and not work on a particular day;[10] and when an hourly paid employee

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[9] As noted in our petition (at 21), there were between 22 and 24 million part-time employees in the United States in 1994. Approximately 65 percent of those part-time employees were women. See Bureau of Labor Statistics, U.S. Dep't of Labor, 42 Employment and Earnings, No. 1, at 21 (Jan. 1995).

[10] "The number of full-time wage and salary workers with flexible work schedules was 12.1 million in May 1991, up from 9.1 million in 1985," increasing the proportion of full-time workers with flexible schedules to 15.1 percent in 1991. See Bureau of Labor Statistics, U.S. Dep't of Labor, News Release No. 92-491, at 1 (Aug. 14, 1992).

Flex-time and compressed schedules vary widely. One common type is a compressed schedule under which a full-time employee works ten hours for each of four work days and does not work on the fifth day. Another common schedule is for a full-time employee to work nine hours for each of eight days out of a two-week (ten-day) payroll period, to work the regular

has a work schedule that requires work on more than five days in a row, followed by a day off on a work day.[11]

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eight hours on the ninth day, and to not work at all on the tenth day. Under the court of appeals' interpretation, hourly paid employees on such compressed schedules would not be counted under Section 2000e(b) on the day they did not work, despite the fact that they are regular, full-time employees.

In 1982, Congress enacted the Federal Employees Flexible and Compressed Work Schedules Act, in which it found that "the use of flexible and compressed work schedules has the potential to improve productivity in the Federal Government and provide greater service to the public." Pub. L. No. 97-221, § 2(a)(2), 96 Stat. 227, codified at 5 U.S.C. 6120. Section 6122 of Title 5 authorizes federal agencies to establish programs that allow the use of flex-time schedules.

In 1993, as part of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, Congress provided that eligible employees are entitled to leave for certain medical reasons, the birth or adoption of a child, or the care of an immediate relative. 29 U.S.C. 2601(b), 2612(a). Such leave may be paid or unpaid, depending on the circumstances. See 29 U.S.C. 2612(c) and (d). Such leave may, in some instances, include a "reduced leave schedule," which means a leave schedule that reduces the usual number of hours per workweek, or hours per workday. See 29 U.S.C. 2611(9), 2612(b). Under the court of appeals' interpretation, whether such employees would be counted for purposes of Title VII coverage would vary depending on the employees' pay status (hourly or salaried) and work schedule.

[11] The court of appeals' interpretation would, at the same time, count for a particular day any employee, even an hourly paid, part-time employee, who works at least part of that day. Thus, under the court of appeals' approach, some hourly paid employees who work 40 or more hours per week are counted on fewer than all the days of the week because of the days they work, but some part-time employees who work as few as five hours per week are counted on every day so long as they work an hour, or perhaps less, each day.

There is no support in the statutory text for treating hourly paid employees differently from salaried employees in this respect.[12] The court of appeals' interpretation appears to be based on the premise that whether an employer-employee relationship exists on a particular day depends on whether the employer pays wages to that employee on that day. It thus counts salaried employees on all days, regardless of whether they actually work, because the employer is paying them compensation during that period of time. It does not count an hourly paid employee except on days the employee works or is on paid vacation—*i.e.*, days for which the employer pays the employee wages. Under that approach, an hourly paid worker is not considered an employee on his or her regular or occasional days off.

That interpretation is inconsistent with the established meaning of the employment relationship,[13]

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[12] Under the court of appeals' approach, a salaried employee is counted under Title VII on each day of the week, regardless of whether he or she is on a regular full-time, flex-time, or part-time schedule.

[13] The Court "ha[s] said on several occasions that when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of th[at] ter[m]. . . . In the past, when Congress has used the term "employee" without defining it, [the Court has] concluded that Congress intended to describe the conventional master-servant relationship understood by common-law agency doctrine.'" *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 455 (1995) (citations omitted). The Court has explained:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by

according to which employees do not cease to be employees on their day off from work. Cf. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971) ("employees of the Employer's plant * * * who work on hourly rates of pay" may include "persons on temporary or limited absence from work, such as employees on military duty"). Generally, nonfinancial compensation such as health insurance and seniority rights continue for both salaried and hourly paid workers on their days off, regardless of whether they are on paid leave. Cf. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 141-143 (1977) (policy that deprived pregnant employees on unpaid leave of accumulated seniority "acts both to deprive them 'of employment opportunities' and to 'adversely affect [their] status as an employee'"). Everyday experience evidences that various employment benefits continue to be provided to hourly paid employees on their days off; indeed, some are specifically designed to be enjoyed when an employee is not working, *e.g.*, health club memberships,

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which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Nationwide Mutual Ins. Co. v. *Darden*, 503 U.S. 318, 323-324 (1992), quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751-752 (1989).

employee discounts, employee holiday parties, and employee picnics. Moreover, in employment relationships where the employer's control includes precluding his or her employee from working for a competitor during the course of his or her employment, the employer and employee clearly understand that their employment relationship continues even on the employee's days off without pay. Hourly paid employees also often remain under the control of their employers on their days off to the extent that the employee must be available to work a shift if a coworker scheduled to work calls in sick.[14]

The court of appeals' interpretation is also contrary to ordinary usage and common sense. An employment relationship is not interrupted when an hourly paid employee has a day off without pay. When it is said that an hourly paid employee "has" a certain employer, or an employer "has" a certain person as his or her employee, the common understanding is that the two people are involved in a continuing employment relationship. Such a relationship clearly continues during an hourly paid worker's regular day off, so long as the expectation is that the employee will report to work on his or her next assigned day. For example, if one

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[14] In *Zimmerman*, the court of appeals stated that it did not reach, and it expressed no opinion about, "the method of counting hourly paid workers on paid leave, the method of counting hourly paid workers on non-paid standby status, and the method of counting salaried workers." 704 F.2d at 354 n.6. The court of appeals in the instant case, however, made clear that its method counts employees in the first and third categories, and the rationale underlying the opinion necessarily would exclude employees in the second category—hourly paid workers on non-paid standby status.

of an employer's 20 employees works according to a flex-time or compressed schedule and has one day off every other week, everyone would agree that the employer still has 20 employees for the entire two weeks.

The court of appeals indicated that it adopted its interpretation of Section 2000e(b) to give meaning to the words "for each working day." It believed that "the most natural interpretation of that phrase looks to the number of employees physically at work on each day of the week." 95-259 Pet. App. 6a. Section 2000e(b), however, does not "contain any limitation indicating that only those individuals actually at the work site on each working day are to be considered employees under Title VII." EEOC Policy Guidance, *reprinted at* 95-259 Pet. App. 36a-37a. Moreover, the EEOC's interpretation also gives meaning to the phrase "for each working day." "Because workers might join or leave a firm midweek, the clause * * * meaningfully modif[ies] the language that follows: 'in each of twenty or more calendar weeks.'" See Recent Case, 109 Harv. L. Rev. 675, 679 (1996); pages 32-33, *infra* (Senate Report accompanying FMLA interprets substantially similar statutory language in this manner, believing that it gives meaning to "for each working day").[15]

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[15] The statutory phrase "for each working day" is part of the initial clause of Section 2000e(b), which specifies the minimum number of employees required for statutory coverage after Title VII has become effective. That language was not included in the clauses of Section 2000e(b) that specified the threshold number of employees required for statutory coverage during the several years of the phase-in period, *i.e.*, the years immediately following enactment and amendment of Section 2000e(b) during which Title VII was not yet at full strength.

As initially enacted, Title VII defined an employer as a person "who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year," but further specified that, "during the first year after the effective date * * *, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers." Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 253-254. When Section 2000e(b) was amended in 1972 to lower the statutory threshold number of employees to 15, the limiting provision was also amended to delay the effective date of the amendment a year by stating that, "during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers."

Under the court of appeals' approach, the definition of "employer" during the phase-in years would be given a different meaning from that applicable after the phase-in periods were completed because of the omission of the "for each working day" language in the phase-in provisions. That would be an unusual result. All of the clauses defining employers serve the same function of establishing the number of employees that triggers Title VII coverage. The absence of the phrase "for each working day" in the clauses governing the phase-in years constitutes additional evidence favoring the EEOC's construction.

B. The Legislative History Also Supports The Payroll Approach

1. An earlier version of the bill, H.R. 7152, 88th Cong., 1st Sess. (1963), that eventually became the Civil Rights Act of 1964, defined "employer," in relevant part, to mean "a person engaged in an

industry affecting commerce who has twenty-five or more employees, and any agent of such a person."[16] Throughout the hearings and floor debates in the House of Representatives on the legislation, both supporters and opponents interpreted that language according to its ordinary usage; it was thus understood to include all employees on an employer's payroll, regardless of their particular work schedules. See, *e.g.*, 110 Cong. Rec. 1620 (1964) (remarks of Rep. Abernethy) (opposing Title VII because it would permit government to object to hiring practices by a store that "employed as many as 25 persons full or part time"); H.R. Rep. No. 914, 88th Cong., 1st Sess. 109 (1963) (Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer) (criticizing Title VII because it would cover any retail service, trade and professional establishment "which employs 25 or more full- or part-time employees"); *id.* at 72 (Minority Report on proposed substitute bill) (posing rhetorical questions about obligations imposed by Title VII regarding "a nonunion individual * * * employed by a corporation which has more than 25 people on its payroll (title VII)"); *Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 457 (1964) (same).[17]

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[16] This definition was contained in the version of H.R. 7152 that was reported out of the Committee on the Judiciary of the House of Representatives, debated and amended on the floor of the House, passed by the House and then referred to the Senate. See 110 Cong. Rec. 12,811-12,812 (1964).

[17] The only relevant amendment made on the floor of the House to the employer definition in the bill that had been reported by the Judiciary Committee changed the length of time over which the coverage was to be phased in. See note 15, *supra*. The reported bill had a phase-in period of four years

When H.R. 7152 was referred to the Senate, there were several efforts, during floor debates, to amend the definition of "employer" in Title VII. The circumstances surrounding the adoption of one of those amendments, and the rejection of another, are instructive.[18]

(no employers covered in first year after enactment; employers with 100 or more employees covered in the second year; employers with 50 or more employees covered in the third year; employers with 25 or more employees covered thereafter). The floor amendment changed this to a phase-in period of five years (adding an intermediate step whereby only employers with 75 employees or more are covered during the third year). See 110 Cong. Rec. 2716-2717 (1964).

In 1972, Congress amended the definition to lower to 15 the threshold number of employees for Title VII coverage. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103. The new jurisdictional requirement did not apply during "the first year after the date" of the enactment of the 1972 amendments.

[18] Although the court of appeals viewed the legislative history of Title VII as "too confused and chaotic to be of much use," 95-259 Pet. App. 5a n.3, the legislative history of Section 2000e(b) is, in fact, quite illuminating. The principal obstacle to its use is the fact that it is contained within the extremely lengthy legislative history of the Civil Rights Act of 1964. It is especially appropriate, however, to look to the legislative history of Section 2000e(b) in this case because the statutory language in question was discussed and added to the legislation, not by a subcommittee or during a committee hearing, but by the primary author of the version of the bill that was enacted into law (Senator Dirksen) during debates on the floor of the Senate that received an extraordinarily high level of attention from members of that body, and which involved roll call votes with 95% or more of the members of the Senate voting. The court of appeals acknowledged that "certain remarks of Senator Dirksen are consistent with [petitioners'] arguments." 95-259 Pet. App. 5a n.3.

The most relevant amendment by the Senate added the language "for each working day for twenty or more calendar weeks in the current or preceding calendar year." The amendment arose out of concerns expressed by Senator Dirksen early in the debates. He noted that the bill "merely provide[d] that an employer would have 100 employees; then the number would drop to 75, then to 50, and then to 25." 110 Cong. Rec. 6450 (1964). He argued that the definition was not specific enough to resolve some questions concerning coverage of employers, such as employers of seasonal agricultural workers and resort employers, who employ a large number of employees for short periods of time each year. See *ibid.*[19]

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[19] Senator Dirksen considered "the operation of a medium-sized orchard. For 11 1/2 months of the year the employer would have no employees, but during 2 weeks of the year he would employ 100 pickers." 110 Cong. Rec. 6450 (1964). Senator Dirksen inquired whether that employer would be subject to the provisions of Title VII. He also inquired about "summer or winter resort operations with employment for only 2 or 3 months, at the most." *Ibid.* Senator Dirksen noted that the Illinois fair employment practice law provided a more specific definition that would have answered these questions more clearly than did the then-pending H.R. 7152. *Ibid.*

A member of the House had raised a similar concern about seasonal workers, but had been unsuccessful in obtaining an exemption. See 110 Cong. Rec. 2728-2729 (1964) (remarks of Rep. Rogers) (introducing unsuccessful amendment exempting from Title VII certain agricultural employers, including those who employ more than the statutory number of employees for short periods of time); *id.* at 2708-2715 (noting problem of "little farmers who are forced, because of the seasonal situation in agriculture, to hire 35 or 40 people for a couple of weeks during the year and hence fall under this act").

Senator Clark responded directly to Senator Dirksen's concerns, explaining that "[t]he term 'employer' [was] intended to have its common dictionary meaning, except as expressly qualified by the act." 110 Cong. Rec. 7216 (1964). Regarding seasonal employees, Senator Clark stated that, under the House-passed version of H.R. 7152, "[e]mployers whose staffs fluctuate seasonally are covered by the act at times when the number of employees exceeds the minimum figure; they are not covered when it is below the minimum." *Id.* at 7216-7217. That interpretation did not satisfy Senator Dirksen's concerns, apparently because it would result in some employers being covered by Title VII for some parts of a year but not for other parts of the same year.

In the Dirksen-Mansfield substitute bill which became the version of H.R. 7152 passed by the Senate (as amended on the floor in other respects), the definition of "employer" was amended to add the language "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[20] Senators Humphrey and Dirksen

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[20] The Dirksen-Mansfield amendment initially was introduced as amendment No. 656, in the nature of a substitute for H.R. 7152. See 110 Cong. Rec. 12,704-12,705, 12,721-12,725, 12,807-12,820 (1964). After amendment No. 656 was amended in accordance with proposals that arose during floor debates, a new version was submitted as amendment No. 1052, in the nature of a substitute for amendment No. 656 and for H.R. 7152. *Id.* at 13,310-13,319. The Senate agreed to amendment No. 1052 as a substitute for amendment No. 656 and for H.R. 7152, *id.* at 14,237-14,239, and ultimately passed that version of H.R. 7152, *id.* at 14,511. An annotated copy of H.R. 7152, reflecting the relevant changes made by the Dirksen-Mansfield substitute amendment appears at 110 Cong. Rec. 12,807-12,817 (1964).

described the changes made by the substitute bill. Senator Humphrey explained that "the definition of 'employer' has been clarified to provide needed certainty as to coverage of employers where the number of employees fluctuates above and below the figure requisite to application of the title. Coverage is limited to those employers who employ more than the required minimum number of employees for at least 20 weeks out of the year." 110 Cong. Rec. 12,722 (1964). Senator Dirksen explained that the "[d]efinition of 'employer' [was] amended to provide a specific test for computing the number of employees of an employer, in determining whether the employer is covered by the bill." *Id.* at 12,818; see also *id.* at 14,331 (remarks of Sen. Williams) ("The Senate amendment * * * defined an employer as one who has 100 employees during the first year of operation of the law, 75 during the second, 50 the third, and 25 thereafter, for each working day in each of 20 or more calendar weeks in the current or preceding year. This exemption for seasonal industries was not included in the House bill.").

The other debate that sheds light on the correct interpretation of the definition of "employer" in Title VII concerned the Cotton amendment—an unsuccessful effort to amend Title VII so that its coverage was limited "permanently * * * to establishments with 100 or more employees." 110 Cong. Rec. 13,085 (1964) (remarks of Sen. Cotton). Senator Dirksen urged (successfully) the rejection of the Cotton amendment, explaining the background of his earlier amendment of the definition of "employer":

> We have spent several months now in an exhaustive effort * * * for the purposes of

> making this as practical and workable as a title of this kind could be.
>
> Accordingly, the House bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect that the definition of the term "employer" would apply to 25 or more who were employees for each working day, in each of 20 or more calendar weeks, in the current or preceding calendar year. We went through that matter with the Department of Labor and others, in order to make sure that we were on good ground.
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> * * * * *
>
> * * * I believe we have taken what is perhaps a sensible figure on the bill, and then nailed it down to make a proper exception for seasonal employees.

Id. at 13,087-13,088.

At that time, the federal statute defining "employer" for purposes of unemployment compensation contributions, to which Senator Dirksen referred, provided that an employer was not covered by the statute "unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was 4 or more." 26 U.S.C. 3306(a) (1958). For purposes of that "employer" definition, all employees were counted on a particular day, including part-time employees, so long as they had an employment relationship with the em-

ployer on that day, regardless of whether the employees performed physical service for the employer that day. See Rev. Rul. 55-19, 1955-1 C.B. 496-499, *reprinted at* J.A. 80-85.[21]

That ruling was based on the IRS's conclusion that

> the employer-employee relationship which exists between the parties does not terminate by reason of their absence from duty for 1 or 2 days during the week. If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week.

J.A. 81. The ruling also explains that the basis on which compensation is paid does not determine whether there is an employer-employee relationship on a particular day. J.A. 83-84. An employer-employee relationship continues to exist on days when an employee is absent from work, regardless of the method or frequency of compensation paid or the employee's status as a part-time employee, so long as

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[21] Revenue Ruling 55-19 addressed inquires that the Internal Revenue Service had "received regarding the method to be used in arriving at a weekly count of employees for purposes of determining liability of an employer under section 1607(a) of the Federal Unemployment Tax Act (subchapter C, chapter 9, Internal Revenue Code of 1939 [26 U.S.C. 1607 (1952]) under certain conditions, particularly where part-time employees are involved." J.A. 80. When Congress enacted the Internal Revenue Code of 1954, it recodified Section 1607(a) at 26 U.S.C. 3306(a). See Internal Revenue Code of 1954, ch. 736, § 3306(a), 68A Stat. 447. The only difference between Section 1607(a), as interpreted in Revenue Ruling 55-19, and Section 3306(a), as in effect in 1964 (*i.e.*, 26 U.S.C. 3306(a) (1958)), was that the required number of employees had been decreased from eight to four. See Act of Sept. 1, 1954, ch. 1212, § 1, 68 Stat. 1130.

the parties intend for the employee to continue to work for the employer on specific days in the future such that the relationship has not been definitely terminated. J.A. 81-85. This ruling was the settled administrative interpretation of the unemployment compensation "employer" coverage provision in 1964, when the Senate amended the Title VII "employer" definition in the Dirksen-Mansfield substitute bill.

The Cotton amendment was rejected in favor of retaining the Dirksen-Mansfield definition. 110 Cong. Rec. 13,093 (1964).[22] The Senate adopted the Dirksen-Mansfield substitute amendment on June 17, 1965, *id.* at 14,237-14,239, and passed H.R. 7152 as amended on June 19, 1964, *id.* at 14,511. See note 20, *supra*. The House voted to accept the Senate substitute without change on July 2, 1964, *id.* at 15,869-15,897, 15,981, and the President signed the Civil Rights Act into law that same day. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

The legislative record of the enactment of Section 2000e(b) thus fully supports the interpretation given it by the EEOC. There is nothing in that record to indicate that Congress meant to exempt from coverage, as the court of appeals would, an employer who has an employment relationship with the required number of employees for the requisite number of days and weeks (as evidenced by payroll records), because

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[22] Senator Humphrey also had argued against the Cotton amendment by defending the Dirksen-Mansfield substitute's definition of "employer" and explaining its purpose and rationale: when the number of an employer's employees gets "above 25, they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services. They also lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13,088 (1964).

some hourly paid employees do not report to work on particular days. See *Thurber*, 717 F.2d at 634 ("legislative history generally weighs heavily against the [employer-defendant's] position"); *id.* at 635 ("there is nothing in the record to indicate a Congressional intent to require that employees report to work on each day that they are included" in the coverage determination). Senator Dirksen's statement that the coverage provision in Title VII was based on the federal unemployment compensation coverage provision reaffirms the logic of the EEOC's interpretation of Section 2000e(b). Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). The court of appeals erred in discounting the historical support for a broad interpretation of Title VII's coverage provision, and in adopting a narrow construction that restricts coverage contrary to expressed congressional intent.

2. Recent legislative action also confirms the soundness of the payroll method of interpreting Title VII's coverage provision. In 1993, Congress enacted the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 *et seq.*, to promote the stability and economic security of families by entitling employees "to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition," while accommodating the legitimate interests of employers. 29 U.S.C. 2601(b)(1), (2) and (3). See note 10, *supra*. Congress used language substantially similar to that in Section 2000e(b) to define those "employers" covered by the FMLA. 29 U.S.C. 2611(4)(A)(i) (set forth in note 5, *supra*).

The Senate Report that accompanied the FMLA stated that the definition of "employer"

> *parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation.* As most courts and the EEOC have interpreted this language, "[e]mploys * * * employees for. each working day" is intended to mean "employ" in the sense of *maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose. * * * [P]art-time employees and employees on leaves of absence would be counted as "employed for each working day" so long as they are on the employer's payroll for each day of the workweek.* On the other hand, an employee who begins employment, i.e., is added to the employer's payroll, after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will not count as being employed on "each working day" of such week.

S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993) (emphasis added). While the FMLA Senate Report cannot serve to establish the intent of Congress at the time it enacted Title VII in 1964, see *Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158, 168 (1989), it clearly demonstrates the reasonableness of the EEOC's payroll interpretation of Section 2000e(b). Indeed, that is the interpretation the Court should adopt. As the Court has recognized, its role is to construe a statute, where the text permits, "to contain that permissible meaning which fits most logically and comfortably into the body of

both previously and subsequently enacted law." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991).

C. Principles Of Administrative Deference Require Application Of The EEOC's Interpretation Of Section 2000e(b)

The court of appeals' interpretation of Section 2000e(b) was based on "a reading of the statute's plain text." 95-259 Pet. App. 6a. As shown above, however, the EEOC's payroll method is at least as consistent with the text of the statute and much more consistent with Title VII's overall structure, purpose, and history. Moreover, the court of appeals itself acknowledged that "the statute could have been worded more clearly," and that the " 'for each working day' language [is] problematic." *Id.* at 6a, 9a. To the extent that Section 2000e(b) is ambiguous, the EEOC's interpretation requires deference.

The EEOC is the federal agency charged with primary responsibility for administering and enforcing Title VII. The agency bears the responsibility for investigating all Title VII charges of discrimination before complainants can seek relief in court. 42 U.S.C. 2000e-5(b). If the EEOC determines, after such investigation, that reasonable cause exists to believe that the charge is true, it must attempt to eliminate the discriminatory practice through informal conciliation. *Ibid.* It is only after these two administrative stages that a case can proceed to federal court; in cases involving private employers, that action can be brought either by the EEOC or by

the charging party. 42 U.S.C. 2000e-5(f).[23] The EEOC's responsibilities for enforcing Title VII also include administering certain recordkeeping requirements. See 42 U.S.C. 2000e-8.

The EEOC's authority to issue regulations under Title VII is limited to procedural regulations. 42 U.S.C. 2000e-12(a).[24] The agency is, however,

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[23] Civil actions against state and local governments are handled by the Attorney General. See 42 U.S.C. 2000e-5(f)(1).

[24] The EEOC is also charged with primary responsibility for administering and enforcing some other antidiscrimination statutes, including the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 630(b). The EEOC's interpretation of Title VII's definition of "employer" is the same interpretation that the EEOC has adopted for purposes of the coverage provision in the ADEA, 29 U.S.C. 630(b) (set forth in note 4, *supra* (using same relevant language as in Section 2000e(b) to define "employer," except that number of employees required is 20 or more)). See EEOC Policy Guidance, *reprinted at* 95-259 Pet. App. 30a-40a. Under the ADEA, the EEOC has explicit statutory authority to issue regulations "necessary or appropriate for carrying out [the ADEA]." 29 U.S.C. 628.

The EEOC also has indicated that the same interpretation of "employer" applies to the essentially identical coverage provision in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111(5)(A). See 29 C.F.R. Pt. 1630, App. ("[T]he title VII definitions of the entities included in the term 'covered entity' (*e.g.* employer, employment agency, *etc.*) are applicable to the ADA."). Under the ADA, the EEOC has explicit statutory authority to issue regulations "to carry out [the ADA]." 42 U.S.C. 12116.

The EEOC's construction of Section 2000e(b) is consistent with regulations issued by the Department of Labor interpreting the "employer" coverage provision of the FMLA, 29 U.S.C. 2611(4)(A)(i) (set forth in note 5, *supra* (using language substantially similar to the language used in Section 2000e(b), except that number of employees required is 50 or more)). See 29 C.F.R. 825.104(a), 825.105(b)-(e), *reprinted at* 95-259 Pet.

expressly given authority to provide legal interpretations and opinions of Title VII to individuals, for whom they have legal effect. Under Section 713 of Title VII,

> [i]n any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of * * * the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, *in conformity with, and in reliance on any written interpretation or opinion of the Commission* * * *. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

42 U.S.C. 2000e-12(b) (emphasis added). It is clear, therefore, that Congress intended that the EEOC make determinations of employer coverage, necessitating interpretation and application of Section 2000e(b) on a daily basis and in individual cases.

The EEOC's interpretation of Section 2000e(b) to count all the employees on the payroll, regardless of their work schedules, dates back to the years immediately following enactment of Title VII. In 1966, the EEOC published the *First Annual Digest of Legal Interpretations of Title VII of the Civil Rights Act of 1964* (1966) (*Digest*), which included EEOC

Supp. Br. App. 1a-2a. Under the FMLA, the Department of Labor has explicit statutory authority to issue regulations "as are necessary to carry out [the FMLA]." 29 U.S.C. 2654.

interpretations of Title VII dating from July 2, 1965, through July 1, 1966. The majority of these interpretations "were made in response to letters of inquiry addressed to the Commission by interested members of the public; the remainder were generated by questions posed by the Commissioners or members of the staff." *Digest* i. The *Digest* included the following interpretation of Section 2000e(b):

> The term "employees for each working day" as used in Sec. 701(b) [2000e(b)] refers to persons on the payroll and regularly employed, not to the number of persons at work on any given day. Thus, if an enterprise operates 7 days a week, but no employee works more than 5 days a week, the number of employees is the number who work regularly for any part of the 7-day week.

Digest 2, citing a May 11, 1966, General Counsel opinion. Also, in *Pascutoi* v. *Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975), the court relied on two opinions by the EEOC General Counsel dated October 18 and 20, 1966. The court explained that the opinions "state[d] that the crucial test is how many employees are on the payroll during the crucial 20-week periods and not how many are at work on a given day." *Id.* at 1326.

As a virtually contemporaneous and long-standing agency interpretation of the statutory term, the EEOC's interpretation is entitled to particular deference. See *Brown* v. *Gardner*, 115 S. Ct. 552, 557 (1994), citing *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); see also *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142-143 (1976); *Satty*, 434 U.S.

at 142 n.4.[25] And, in 1990, the EEOC affirmed its early interpretation in a detailed policy guidance based upon a thorough review of the conflicting case law, 95-259 Pet. App. 32a-34a, the relevant legislative history, *id.* at 34a-35a, and general principles of statutory construction, *id.* at 36a-38a. The EEOC noted that the *Zimmerman* counting method would permit employers to "manipulate work schedules to avoid coverage under Title VII." *Id.* at 38a, citing *Gorman* v. *North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) ("Under [the *Zimmerman*] construction, a business that operates almost entirely with part-time labor could escape the prohibitions of the [Act], despite the number of workers.").[26] The EEOC also observed that

[25] The Seventh Circuit was aware of the EEOC's early interpretation of Section 2000e(b). In *Zimmerman*, the court of appeals identified the decision in *Pascutoi*, 11 Fair Empl. Prac. Cas. (BNA) at 1326-1327, as "a case which seems factually on point" but with a result contrary to its own. 704 F.2d at 353. The *Pascutoi* court relied on the EEOC General Counsel opinions and the Seventh Circuit expressly noted that the court in *Pascutoi* "held that the crucial question is how many employees were on the payroll during the week, not how many were at work on a given day." *Ibid.*; see *Pascutoi*, 11 Fair Empl. Prac. Cas. (BNA) at 1326. The EEOC cited *Pascutoi* in support of its position in this case as well. R. 38, at 6.

[26] See also *Edwards* v. *Esau Investments, Inc.*, Civ. A. No. 93-4130-DES, 1994 WL 606073, at *4 (D. Kan. Oct. 31, 1994) (*Zimmerman* approach "encourages businesses to manipulate the schedules of part-time workers to escape the prohibitions of Title VII"); *Wright* v. *Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) ("The approach taken in *Zimmerman* affords an employer the opportunity to circumvent the proscriptions of the ADEA and of Title VII, thereby denying the protection of those statutes" to a substantial number of employees.).

"proof under the *Zimmerman* approach would be difficult for plaintiffs to obtain. Even assuming that an employer kept and maintained time cards and leave records, it would be an extremely tedious task to determine how many employees reported to work each day during the two-year period provided for by the statute." *Id.* at 39a.[27] The comparative simplicity of the payroll method constitutes a benefit for the EEOC and a significant number of employees, job applicants, and relatively small employers. Cf. *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318, 327 (1992) (rejecting definition of employee for purposes of Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(6), in part because it would "severely compromise the capacity of companies * * * to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be").

The EEOC's interpretation "is based on a permissible construction of the statute," and reflects "a reasonable policy choice for the agency to make." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984). The thor-

[27] The fact that the court of appeals' approach requires additional recordkeeping is inconsistent with one of the main concerns expressed during the congressional debates regarding enactment of Title VII. Members of Congress emphasized that they did not intend to impose burdensome new recordkeeping requirements on employers. See, *e.g.*, 110 Cong. Rec. 2708-2715 (1964) (remarks of Rep. Smith); *id.* at 7214 (remarks of Senators Clark and Case) (discussing fact that "[m]ost of the persons covered by the title are already required by law or by practical necessity to keep records similar to those which will be required under this title," and that recordkeeping requirements imposed under Title VII could be "worked into existing requirements and practices so as to result in a minimum [of] additional burden").

oughness of the agency's consideration of the issue, the validity of its reasoning, and the persuasive nature of its interpretation warrant its adoption by the Court. *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 256-258 (1991). The fact that the interpretive issue in question is one that Congress clearly intended the agency to address on a daily basis, in light of its statutory responsibilities, underscores the weight appropriately to be given the agency's view. Cf. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986) ("body of experience and informed judgment to which courts and litigants may properly resort for guidance").

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 applies only to "employer[s]." Section 701(b) of Title VII defines the term "employer" as a person who is "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). The courts of appeals have adopted two methods of counting hourly paid employees to determine whether a person is an "employer" subject to Title VII. The question presented is:

Whether, for purposes of Section 701(b) of Title VII, an hourly paid employee is counted among a "person's" employees on days when the employee is not at work.

PARTIES TO THE PROCEEDINGS

Darlene Walters and the Equal Employment Opportunity Commission (EEOC) were appellants in the proceedings in the court of appeals. Metropolitan Educational Enterprises, Inc. and Leonard Bieber were appellees below.

Darlene Walters is the petitioner in *Darlene Walters v. Metropolitan Educational Enterprises, Inc.*, No. 95-259. The EEOC is the petitioner in *Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.*, No. 95-779. The Court granted the petitions for a writ of certiorari and consolidated the cases on March 18, 1996. ___ U.S. ___, 116 S. Ct. 1260, 134 L.Ed. 209 (1996).

RULE 29.6 STATEMENT

Metropolitan Educational Enterprises, Inc. has no parent companies or subsidiaries to be listed pursuant to Rule 29.6

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1 EEOC Compliance Manual 605.8(b) *Does Respondent Employ 15 or More Employees* (BNA) 605:021 38

3 EEOC Compliance Manual (BNA), *Policy Guidance: Whether part-time employees are within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, N:3311-N:3316 ..... 35, 36

Equal Employment Opportunity Commission, *Legislative History Of Titles VII and XI Of The Civil Rights Act Of 1964* (1968) 22, 25

OPINIONS BELOW

The opinion of the court of appeals (95-259 Pet. App. 1a-12a) is reported at 60 F.3d 1225. The district court's opinion (95-259 Pet. App. 13a-19a) is reported at 864 F.Supp. 71.

JURISDICTION

The court of appeals entered its judgment on July 18, 1995. Darlene Walters filed a petition for a writ of certiorari on August 14, 1995. *Walters v. Metropolitan Educational Enterprises, Inc.*, No. 95-259.

On October 10, 1995 Justice Stevens extended the time for the Solicitor General to file a petition for a writ of certiorari to and including November 15, 1995. The Solicitor General filed a petition for a writ of certiorari on behalf of the EEOC on November 15, 1995. *Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.*, No. 95-779.

The Court granted both petitions for a writ of certiorari and consolidated the cases on March 18, 1996. 116 S. Ct. 1260. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 defines the term "employer" as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .

42 U.S.C. § 2000e(b).

STATEMENT OF THE CASE

Metropolitan Educational Enterprises sells encyclopedias, dictionaries and other educational materials to retail customers throughout the United States. J.A. 15, 17.[1] Leonard Bieber is the president of Metropolitan. J.A. 23. Darlene Walters worked for Metropolitan as a collector from January 3, 1986 until she voluntarily resigned on Tuesday, April 10, 1990. R. 12 at 2; R. 20 at 7.[2]

On Friday, April 13, 1990, Walters returned to Metropolitan and asked to be rehired. R. 12 at 7-8. Metropolitan allowed Walters to return to work. R. 12, at 7-8. Before she returned to work, however, Walters had filed a charge

[1] Citations to the Joint Appendix are designated "J.A." followed by the page number where appropriate.

[2] Citations to the Record are designated "R. #." References are to the district court's docket sheet and, where appropriate, to the page number.

of discrimination with the EEOC alleging that Metropolitan had denied her a promotion to the position of credit manager on account of her sex in September, 1989.[3] See R. 12, at 3-4; J.A. 20-2; EEOC Brief at 3.

On Monday, April 23, 1990, Metropolitan terminated Walters for unsatisfactory job performance. R. 12 at 7-8. Walters filed a second charge of discrimination, this time alleging that Metropolitan discharged her in retaliation for having filed the initial charge. R. 12 at 3-4.

Efforts at conciliation failed and the EEOC filed suit against Metropolitan and Bieber in the district court on April 7, 1993. R. 1, at 2. The EEOC alleged that Metropolitan and Bieber had retaliated against Walters in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964 by discharging her for having filed a charge of discrimination. R. 1 at 3. Walters intervened as a matter of right under 42 U.S.C. § 2000e-5(f)(1) and Rule 24(a)(1) of the Federal Rules of Civil Procedure. R. 10. Her amended complaint reiterated the EEOC's retaliation claim. R. 12 at 3-4. Walters further alleged that Metropolitan had failed to promote her to the position of credit manager solely on account of her sex in violation of Section 703 of Title VII. R. 12 at 2-3. Finally, Walters alleged pendent claims for breach of contract and common law retaliatory discharge under Illinois law. R. 12 at 4-5.

[3] The EEOC investigated this charge and determined that the evidence did not establish a violation because the individual Metropolitan had promoted was better qualified for the job. *See* Walters' Brief at 4 n.3.

Metropolitan and Bieber denied the material allegations of the complaints, including the allegations that each was an "employer" within the meaning of Title VII of the Civil Rights Act of 1964. R. 2 at 3; R. 3 at 3-4; R. 20 at 2; R. 21 at 2. They moved to dismiss the complaints for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. R. 25. They contended that neither Metropolitan nor Bieber was an "employer" subject to the provisions of Title VII.[4] R. 26, at 3.

Section 701(b) of the Civil Rights Act of 1964 defines "employer" to mean "a person engaged in an industry affecting commerce who has at least fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). Respondents argued that Metropolitan did not employ fifteen or more employees on each working day in each of twenty or more calendar weeks in either 1989 or 1990. R. 26, at 3-5.

Respondents relied upon the district court's previous decision in *Norman v. Levy*, 767 F.Supp. 1441, 1449 (N.D.Ill. 1991). In *Norman v. Levy*, the district court applied the counting method that the Seventh Circuit had articulated in *Zimmerman v. North American Signal Co.*, 704 F.2d 353 (7th Cir. 1983). In *Zimmerman*, the Seventh Circuit held that hourly paid workers are not to be counted as "employees for days when they were neither working nor on paid leave." *Id.* at 354. The court reserved and

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[4] Respondents also moved to dismiss Walters' pendent claims for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1367(a). R. 26 at 5-6.

expressed no opinion on several issues that were not necessary for its conclusion. *Id.* at 354 n.6. Those issues included the method of counting *hourly paid workers on paid leave*, and the method of counting salaried workers. *Id.*

Counsel for respondents supervised the review and analysis of Metropolitan's time cards and biweekly payroll worksheets and registers for 1989 and 1990 in accordance with the procedure the district court had previously followed in *Norman v. Levy*.[5] *See* R. 25 following Tab 5. Respondents' counsel oversaw the preparation of a detailed weekly analysis of Metropolitan's payroll records for each calendar week of 1989 and 1990. R. 26 following Tab 5. The worksheets listed the name of each employee on Metropolitan's payroll for each calendar week, and for each day of the week, the number of hours each employee worked or for which he or she received holiday pay, sick pay or vacation pay. *See* R. 26 following Tab 5.

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[5] The district court addressed the proper method of counting employees for purposes of Section 701(b) of Title VII. *Norman v. Levy*, 756 F.Supp. 1060 (N.D. Ill. 1990). There, the court attempted to apply the counting method the Seventh Circuit had articulated in *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983). The district court entered and continued the defendant's motion to dismiss because the evidence the parties initially presented left the court "unable to make a finding either way as to its jurisdiction." *Norman*, 756 F.Supp. at 1065. The court also requested that the parties "submit further evidence and a new employee count" in a manner consistent with the Seventh Circuit's approach in *Zimmerman, id.*

Respondents counted all of Metropolitan's hourly paid employees for each working day they worked, regardless of the number of hours worked. Respondents also counted Metropolitan's hourly employees for each working day they were on paid leave. Metropolitan's only salaried employee, Bieber, was counted for each working day of the year. This approach, while more inclusive than that mandated by the Seventh Circuit's holding in *Zimmerman* produced a similar result. Metropolitan did to have fifteen or more employees at work or on paid leave for each working day in each of twenty or more calendar weeks in either 1989 or 1990. R. 26, at 2-3.

Petitioners successfully moved to strike the weekly payroll analysis respondents' counsel had prepared and then undertook discovery. R. 31; 63-2. Much of the discovery in this case focused upon whether independent sales representative were "emplyees" within the purview of Section 701(f) of Title VII.[6] The remaining discovery consisted of the production of Metropolitan's payroll records.

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[6] Petitioners' request for production called for the production of nearly 3,000 pages of documents. Approximately one half of these documents related to Metropolitan's independent sales representatives. The documents included those individuals' applications and contracts with Metropolitan, their 1099 forms for the years 1989 and 1990, and even records relating to their sales of merchandise and the commissions they earned. Mr. Bieber's deposition lasted for more than two full days, during which much of the petitioners' interrogation centered around the nature of Metropolitan's relationship with its independent sales representatives. Ultimately, Walters stipulated that Metropolitan's sales representatives were not "employees." R. 40 at ¶¶ 2-11.

After completing discovery, the parties prepared a second set of weekly summaries similar to the analysis Metropolitan had appended to its motion to dismiss. J.A. 28-79. Based upon the analysis of Metropolitan's 1990 payroll records, the parties stipulated to the following facts.

> 1. There were only nine calendar weeks during 1990 during which Metropolitan had 15 or more employees working or on paid leave on each working day. J.A. 23-24 at ¶ 11.
>
> 2. During the remaining 43 calendar weeks of 1990, Metropolitan did not have 15 or more employees working or on paid leave on each working day. J.A. 24 at ¶ 11.
>
> 3. Finally, there were 15 or more employees on Metropolitan's payroll during 47 calendar weeks of 1990. J.A. 24 at ¶ 12.

The parties submitted the weekly summaries and their stipulations to the district court. 95-259 Pet. App. 15a. The EEOC urged the court to count the number of employees on Metropolitan's payroll. R. 38, at 5-7. The district court noted that circuit precedent supported respondents' counting method and granted their motion to dismiss. 95-259 Pet. App. 13a-19a.

The court of appeals affirmed. 95-259 Pet. App. 1a-12a. The court reaffirmed its earlier holding in *Zimmerman id.* While *Zimmerman* gave the phrase "for each working day" "its most natural interpretation." The panel rejected the petitioners' proposed interpretation of the phrase "for each working day" finding it "highly unlikely" because the "instances where employees begin work on Wednesdays or depart on Thursdays are

unlikely to occur with sufficient frequency to merit inclusion in a federal antidiscrimination statute." *Id.*

SUMMARY OF THE ARGUMENT

Congress defined "employer" to limit the application of Title VII to those persons who "ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). The plain language of the definition is correctly interpreted to count employees for each day when they are at work. The payroll method urged by the petitioners, on the other hand, renders the phrase "for each working day" meaningless. Petitioners' inconsistent interpretation of the payroll method illustrates its failure to give the phrase "for each working day" the meaning they ascribe.

In the absence of a clear legislative intent to the contrary, the definition must be interpreted as it was written. The sparse legislative history that relates specifically to the phrase "for each working day" does not support petitioners' interpretation. The daily method is consistent with congressional intent to exclude small employers from Title VII. Since the definition is jurisdictional, it should be strictly construed.

This Court owes no deference to the EEOC's interpretation. As noted above, the language of the statute is plain and it defines the scope of the EEOC's jurisdiction. Finally, the EEOC's interpretation of the payroll method has been inconsistent, even during this course of this

litigation. Thus, deference to its Policy Guidance would be inappropriate.

ARGUMENT

I. While The *Zimmerman* Method Is Consistent With The Plain Meaning Of The Statute And Gives Effect To The Phrase "For Each Working Day," The Payroll Method Does Not.

Petitioners contend that the plain meaning of Title VII supports the payroll method. They maintain that the payroll method's emphasis upon the existence of the employment relationship gives effect to the phrase "for each working day." The petitioners' proposed interpretation does not comport with the common understanding of the plain language of the statute. Indeed, their interpretation renders the phrase "for each working day" superfluous. Moreover the petitioners' application of the payroll method fails to give effect to their proposed interpretation of the phrase "for each working day." Finally, the fact that Title VII has a remedial purpose is insufficient to overcome the meaning of the plain language of the statute.

A. The Plain Language Of Title VII Supports The Interpretation Of The Courts Below And Militates Against The Payroll Method.

When interpreting a statute, a court must begin with the language of the statute itself. *E.g., Estate of Cowart v. Nickols Drilling Co.*, 505 U.S. 469, 476 (1992); *Consumer*

Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). If the statute is clear and unambiguous, as it is in this case, the language must be regarded as conclusive and judicial inquiry into the meaning of the statute is finished. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). For purposes of Title VII, Congress defined an "employer" as "any person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks." 42 U.S.C. § 2000e(b). Petitioners rely heavily upon the definition's use of the verb "has" to conclude that the definition contemplates the existence of an employment relationship. The definition might be construed as petitioners suggest, at least when the verb "has" is read in isolation. But statutory language must not be read in isolation because its meaning depends upon its context. *Shell Oil Co. v Iowa Department of Revenue*, 488 U.S. 19, 25 (1988). Judge Learned Hand explained this cardinal canon of statutory construction as follows:

> "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used."

NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941). Thus, the "relevant phrase in the definitional part of the statute must be read in its entirety." *Gustafson v. Alloyd Co., Inc.*, ___ U.S. ___, 115 S.Ct. 1061, 1069 (1995).

Title VII's definition of "employer" does not speak merely in terms of the number of employees a person "has." When read in its entirety, the definition speaks in

terms of the number of employees a person "has" "for each working day in each of twenty or more calendar weeks." Respondents' interpretation of the definition is consistent with, and gives meaning to the plain language of the statute. Petitioner's interpretation, on the other hand, renders the phrase "for each working day" meaningless surplusage. In an attempt to avoid that result, petitioners ascribe a strained meaning to the phrase "for each working day," suggesting that the phrase excludes employees whose "employment relationship" began or ended during a calendar week. *See* EEOC Brief at 22; Walters' Brief at 22-23. The Seventh Circuit rejected this interpretation as "highly unlikely." The court found that the instances of employees beginning or ending work midweek were "unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." *EEOC v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1228 (7th Cir. 1995).

In common parlance, if an employer were asked how many employees he "has" on any given day, he would probably count the time cards next to the company's time clock. The resulting count would include each hourly-paid employee, whether he worked that day or not, and if so, without regard to the number of hours worked. This counting method would necessarily exclude any individual who was not in an employment relationship with the employer on a given day. Thus, persons who had not yet begun, or who had already terminated their employment relationship with the employer, would not be counted. If the employer repeated this process for each working day of a given week, the resulting tally would include each hourly-paid employee with whom the employer had an

employment relationship without regard to the number days or hours that employee actually worked during the week. This method would produce the same result as the payroll method petitioners' now propose before this Court. Thus, petitioners' suggested interpretation of the phrase "for each working day" adds nothing to Title VII's statutory definition of "employer." Courts should not construe a statute in a way that renders words or phrases meaningless, redundant or superfluous.

But if the same employer were asked how many employees he or she "has" "for each working day in [a given] calendar week," he would probably adopt a different counting method. The employer would probably gather the company's time cards for the week in question and then, "for each working day," tally the number of employees who actually worked – even if for only a portion of the day. The Seventh Circuit found this to be "the most natural interpretation of the phrase ['for each working day']." *EEOC v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1228 (7th Cir. 1996); *see also Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353-54 (7th Cir. 1983).

B. Petitioners' Application Of The Payroll Method Is At Odds With Their Interpretation Of The Payroll Method Before This Court And Fails To Give Effect To The Phrase "For Each Working Day."

Walters offers two examples to illustrate how application of the payroll method gives effect to the phrase "for each working day." In Walters' first scenario, a new

employee is hired and begins working on Tuesday. Walters' Brief 22. Because he did not start work until Tuesday, this individual was not an employee "for each working day" of the "calendar week." Accordingly, this individual would not be counted in the week he began his employment. Walters' Brief at 22. The second hypothetical involves an employee who terminates her employment on a Thursday. Walters' Brief at 22. Since the employee terminated her employment on the fourth "working day" of the "calendar week," she was not an employee "for each working day" of that week. Thus, she should not be counted in the week her employment was terminated. Walters' Brief at 22-23.

Petitioners took a decidedly different approach when they applied the payroll method in the courts below. Each of the weekly payroll summaries included in the Joint Appendix indicates the "Number of Employees on [Metropolitan's] Weekly Payroll." *See, e.g.*, J.A. 43. For each and every week, the number indicated corresponds to number of persons whose names appeared on Metropolitan's payroll. Thus, petitioners counted employees who began employment after Monday and those who terminated their employment before Friday just as if their employment relationship existed "for each working day" of the calendar week their employment began or ended. Petitioners' own application of the payroll method in this case renders the phrase "for each working day" meaningless. Moreover, their application of the payroll method is at odds with the interpretation they now ascribe to that phrase in this Court.

Petitioners' analysis of the week beginning April 23 best illustrates their application of the payroll method in

the courts below. Metropolitan began that week with fifteen persons on its payroll. *See* J.A. 43. There were two "midweek employment changes"[7] during that week. Petitioner Walters was terminated on Monday April 23. (J.A. 44) Since her employment relationship with Metropolitan ended on the first "working day" of the week, Walters no longer stood in an employment relationship with Metropolitan for the remaining four "working days" of the "calendar week." *Cf.* Walters' Brief at 22-23. Metropolitan had an ongoing employment relationship with only 14 employees "for each working day" during the rest of that week. Shyanne Davis began working for Metropolitan on Thursday, April 26 – the fourth "working day" of the "calendar week." Walters' Brief at 11; (J.A. 44). Thus, like Walters, Davis did not have an employment relationship with Metropolitan "for each working day" of that calendar week. *Cf.* Walters' Brief at 22. Nevertheless, petitioners counted both Walters and Davis "for each working day" of the calendar week of April 23 when neither had an employment relationship with Metropolitan "for each working day" of that week. As a result, the weekly payroll summary indicates that Metropolitan had 16 employees "on [its] weekly payroll," when it had an employment relationship with only 14 employees "for each working day" during that week. *See* J.A. 44. Petitioners included this week among those they maintain should be counted toward the jurisdictional minimum. *See* J.A. 24-25 at ¶ 12 ("there were fifteen (15) or more

[7] Petitioners use this term to describe those situations in which an employee either joins or leaves an employer's workforce midweek, *i.e.*, other than starting on Monday or leaving on Friday. Walters' brief at 10, 22-23.

employees *on [Metropolitan's] payroll* during each of the following calendar weeks: . . . April 23 to April 27. . . . ") (emphasis added). Contrary to the position they take before this Court, Petitioners consistently counted employees for each week their names appeared on the payroll, including weeks when an employee did not stand in an employment relationship with Metropolitan "for each working day" of the week.[8] Petitioners' application of the payroll method in the courts below stands in

[8] The week beginning April 2, 1990 again illustrates how the petitioners' application of the payroll method erroneously increased the jurisdictional count. James Frawley left Metropolitan's employment on Monday April 2, 1990 – the first "working day" of the calendar week. (JA 41); *see also* Walters' Brief at 11. After Mr. Frawley had terminated his employment, Metropolitan had only fourteen employees on its payroll for each of the remaining days of the week. Yet, petitioners counted Mr. Frawley as the pivotal fifteenth "for each working day" of the remainder of the week, apparently ignoring the fact that his "employment relationship" had been terminated. *See* (JA 53) ("Number of Employees on Weekly Payroll – 15") (JA 24-25 at ¶ 12) (counting the week of April 2 through April 6 among the weeks "there were fifteen (15) or more employees *on [Metropolitan's] payroll.*") (emphasis added.)

The week of June 11 provides yet another example. Metropolitan began that week with a total of fourteen employees on its payroll. (JA 51) Wayne Sallee began working for Metropolitan on the last working day of the week – Friday June 15. (JA 51); *see also* Walters' Brief at 11. Since Metropolitan and Mr. Sallee did not have an employment relationship "for each working day" of the week of June 11, petitioners should not have counted him for that week. *See* Walters' Brief at 22, 25. Nevertheless, petitioners counted Mr. Sallee as Metropolitan's fifteenth employee "for each working day" of that week, thereby adding yet another week to their jurisdictional count. *See* JA at 51 ("Number of Employees on Weekly Payroll – 15"); (JA at 24-25 ¶ 12) (counting the week of June 11 to June 15

stark contrast to the payroll method petitioners espouse before this Court.

C. Settled Principles Of Statutory Construction Favor A Strict Construction Of Section 701(b) And Militate Against The Payroll Method.

Petitioners urge this Court to construe the definition of "employer" liberally because Title VII is a remedial statute. Their analysis overlooks the plain meaning of the

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among the weeks when "there were fifteen (15) or more employees *on [Metropolitan's] payroll*") (emphasis added).

The stipulations and weekly summaries printed in Joint Appendix reveal that for each week a person either started or left Metropolitan's employ, petitioners' application of the payroll method contradicts the position they have taken before this Court. Aaron Hunter left Metropolitan's employ on Thursday, June 28; yet, petitioners counted him as Metropolitan's fifteenth employee for "each working day" of that week. *See* Walters' Brief at 11; (JA 53); (JA 24-25 at ¶ 12). Joseph Wilds left Metropolitan on Thursday, July 19. (JA 56) Still, petitioners counted him "for each working day" of that week. *See* Walters' Brief at 11. (JA 24-25, 56). Lizbet Thome-Steiner's last day with Metropolitan was Monday, August 20. Walters' Brief at 11; (JA 61). Petitioners counted her "for each working day" through Friday, August 24. (JA 24-25, 61). On Friday October 5, Derek Gendron and Scott Gibson began working for Metropolitan. Walters' brief at 11; (JA 67). Once again, petitioners counted both of these individuals "for each working day" of a week even though their employment relationship with Metropolitan did not begin until Friday - the last "working day" of that week. (JA 24-25, 67). Finally, Paul Slevin left Metropolitan on Thursday, December 13, (Walters' brief at 11; (JA 77)), but was counted "for each working day" of that week (JA 24-25, 77).

statute and invites an unwarranted expansion of federal subject matter jurisdiction.

Title VII is indeed remedial legislation. Generalized references to the remedial purposes of a statute do not afford the judiciary sufficient justification to read a provision more broadly than its language permits. *Aaron v. SEC*, 446 U.S. 680, 695 (1980); *see also* 3 N. Singer, *Sutherland's Statutory Construction* § 60.01 at 148 (1984). As respondents have demonstrated, the plain meaning of the statute supports their interpretation of the definition of "employer." This Court should therefore decline petitioners' invitation to read that provision more broadly than Congress intended.

Moreover, a person's status as an "employer" determines whether an employee is entitled to a federal forum for redress of discrimination in employment. Thus, section 701(b) of Title VII is not only a definitional statute, but in a broader sense, a jurisdictional one.[9] As such, it must be strictly construed. *E.g., Healy v. Ratta*, 292 U.S. 263, 270 (1934) (federal courts should "scrupulously confine their own jurisdiction to the precise limits" defined by Congress.) This Court has expressed its "deeply felt

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[9] Title VII's strictures against discriminatory and retaliatory conduct retaliation apply only to "employers," as that term is defined in Section 701(b). *See* 42 U.S.C. §§ 2000e-2(a); 2000e-3(a). Section 706(f)(1) authorizes the EEOC to bring a civil action to redress alleged violations of Title VII. 42 U.S.C. § 2000e-5(f)(1). Section 706(f)(3) vests the district court with jurisdiction of actions commenced under Title VII. 42 U.S.C. § 2000e-5(f)(3). Thus, whether the EEOC may commence an action in the district court depends upon whether the putative defendant is an "employer."

and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Guided by these cardinal canons of statutory construction, the Fifth Circuit strictly construed Title VII's definition of "employment agency" in *Greenlees v. Eidenmuler*, 32 F.3d 197, 200 (5th Cir. 1994). This Court should decline petitioners' invitation to expand federal subject matter jurisdiction by construing the definition of "employer" more broadly than its plain meaning permits.

II. The Legislative History Of Title VII Does Not Provide A Clear Indication That Congress Intended That The Payroll Method Be Applied.

The plain meaning of Title VII's definition of "employer" supports respondents' view that hourly-paid employees be counted only on those days when they actually work. Accordingly, consideration of legislative history is neither useful nor appropriate. *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987).

Should this Court conclude that exceptional circumstances warrant its consideration of legislative history to ascertain Congressional intent, it should proceed with caution. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977). Petitioners present a lengthy analysis of the legislative history of Title VII. Stripped of its irrelevant detail, petitioners' argument rests on a few passing general references in the legislative debates. Much of the legislative history Petitioners' rely upon preceded the Senate

amendment that added the phrase "for each working day in each of twenty or more calendar weeks." The history of that amendment is sparse. And what little history there is provides no specific explanation for the phrase "for each working day." The history does, however, reveal a broader Congressional intent to count hourly-paid workers only when they actually work.

A. The Legislative History Of Title VII Lacks The Sources Of Congressional Intent This Court Has Historically Deemed Authoritative – Reports Of Congressional Committees That Drafted And Studied The Legislation.

Title VII traces its roots to H.R. 7152, 88th Cong., 1st Sess. (1963), a bill introduced in the House of Representatives on June 20, 1963.[10] On February 10, 1963, the House passed a version of the bill that defined"employer" as:

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[10] A subcommittee of the Judiciary Committee of the House of Representatives prepared a substitute for H.R. 7152. After offering the substitute and moving for its approval, the Chairman of the Judiciary Committee announced that no amendments to his proposal could be offered, that no debate would be had and that no questions would be permitted or answered. H.R. Rep. No. 914, 88th Cong. , 1st Sess. 63 (Minority Report Upon Proposed Civil Rights Act Of 1963, Committee On Judiciary Substitute For H.R. 7152). The bill was read without opportunity for amendment. *Id.* Several members of the committee repeatedly sought recognition to ask questions or offer amendments, but the Chair refused to recognize those members of the committee. *Id.* In all, the bill was discussed for a total of only two minutes, with one minute being allotted to the ranking minority member and the other reserved to the Chairman. *Id.* Neither of these members yielded to any other member of the committee. *Id.* Both the Chairman and the ranking member of the minority confined their terse remarks to

> "a person engaged in an industry affecting commerce who has twenty-five or more employees, and any agent of such a person . . .

H.R. Rep. No. 914, 88th Cong., 1st Sess. 9 (1963). The EEOC maintains that several Congressmen understood this definition of "employer" to include all employees on an employer's payroll regardless of their work schedules.[11]

Four months after the House had adopted H.R. 7152, the Senate amended the definition of "employer" by adding the phrase "for each working day in each of twenty or more calendar weeks." *See* Amendment No. 656 to H.R. 7152 in the Nature of a Substitute, *reprinted at* 110 Cong. Rec. 11,926 (1964); *see also* 110 Cong. Rec. 12,811-12,817 (1964) (text of H.R. 7152 annotated to indicate changes made by Senate amendment No. 656). Common sense dictates that whatever might be gleaned from several Congressmen's interpretation of H.R. 7152 *before* it was amended in the Senate provides little evidence of what Congress intended when it adopted the Senate amendment to the definition of "employer." Put another

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their support of the bill. *Id.* During the brief discussion of the bill, there was no attempt to explain the provisions of the bill. *Id.* The committee neither debated nor permitted the opportunity to debate the bill. *Id.*

[11] This interpretation appears to be consistent with the plain language of H.R. 7153 as it was reported and passed by the House. Moreover, this interpretation of the definition of "employer" *without* the phrase "for each working day" is also consistent with Petitioners' application of the payroll method in the courts below.

way, whatever Congressman Abernathy and his colleagues understood H.R. 7152 to have meant *before* the Senate amended the bill could not have reflected what Congress intended when it added the phrase "for each working day."

The EEOC's reliance upon the legislative history before the Senate amendment added the phrase "for each working day" is misplaced. This Court has accorded little weight to the isolated remarks of a single legislator. *E.g., Weinberger v. Rossi,* 456 U.S. 25, 35 (1982). Nor has the Court accorded much weight to the statements of a bill's opponents. *Shell Oil Co. v. Iowa Department of Revenue,* 488 U.S. 19, 29 (1988).

Nor does legislative history of the Senate amendment to H.R. 7152 provide any authoritative indication of what Congress meant when it added the phrase "for each working day" to the definition of "employer." When faced with questions of legislative intent, this Court has demonstrated its strong preference for Congressional Committee Reports over the isolated remarks of legislators during debate. Repeatedly, the Court has recognized that "the authoritative source for legislative intent lies in the Committee Reports on [a] bill." *E.g., Thornburg v. Gingles,* 478 U.S. 30, 43 n. 7 (1986); *Garcia v. United States,* 469 U.S. 70, 76 and n. 3 (1984); *Zuber v. Allen,* 396 U.S. 168, 186 (1969). The Court's reliance upon committee reports rests upon the following rationale:

> A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.

Zuber v. Allen, 396 U.S. at 186 (1969). The legislative history of Title VII does not include a single committee report that explains why Congress added the phrase "for each working day" to the definition of "employer."[12] Even Senator Dirksen, one of the co-sponsors of the bill, attributed his own confusion to the absence of Senate committee hearings and reports. 110 Cong. Rec. 6450, 7215-7216 (1964).[13] Most notably missing from the

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[12] After H.R. 7152 passed the House it was referred to the full Senate rather than to the Senate Judiciary Committee as was the usual and customary procedure. The EEOC's editorial commentary to its *Legislative History of Title VII* suggest that supporters of the measure in the Senate considered members of the Judiciary Committee hostile to the bill. Equal Employment Opportunity Commission Legislative History of Titles VII and XI of the Civil Rights Act of 1964. As a result, there is no report from the Senate Judiciary Committee. The Dirksen-Mansfield amendment was the product of an informal bipartisan conference. *Id.* at 3001. Accordingly, no committee reported on the Senate substitute. Since the Dirksen-Mansfield substitute amended the House Bill, a conference committee would have resolved any differences between the bills including the Senate amendment adding the phrase "for each working day." No conference report was ever prepared. Thus, what would have been the most illuminating source of legislative history is lacking. *Id.* at 3001; 2A N. Singer, *Sutherland's Statutory Construction*, § 48.08 at 340 ("Since the conference report represents the final statement of terms agreed to by both houses of Congress, next to the statute itself, it is the most persuasive evidence of Congressional intent.")

[13] "Reliance upon legislative history is hazardous at best, but when 'not even the sponsors of the bill knew what it meant,' . . . such reliance cannot form a reasonable basis on which to interpret the text of a statute." *Westside Community Schools v. Mergens*, 496 U.S. 226, 242-43 (1990) Title VII's legislative history has similarly frustrated some courts. In

legislative history is a conference report reconciling the differences between the House Bill without the phrase "for each working day" and the Senate substitute including the amendment. Courts and a leading commentator agree that "the Conference Report . . . is the most persuasive evidence of congressional intent besides the statute itself." *E.g., Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 421 (7th Cir. 1993); *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C.Cir. 1981); 2A N. Singer, *Sutherland's Statutory Construction*, § 48.08 at 340.

The only remaining source of legislative history consists of the isolated remarks of Senator Dirksen during the Senate debate. Walters erroneously characterizes Senator Dirksen's remarks as the "most powerful and persuasive history imaginable." Walters' Brief at 37. Unlike committee reports, floor debates merely "reflect at best the understanding of individual Congressmen." *Zuber v. Allen*, 396 U.S. at 186 (1969). Justice Jackson cautioned against reliance upon such debates, noting that Congressional debate is "not always distinguished for candor or accuracy." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring); Guided by these principles, this Court has historically accorded little weight to the comments of even the sponsor of legislation. *E.g., Weinberger v. Rossi*, 456 U.S. 25, 35 and n. 15 (1982); *Consumer Product Safety Commission v. GTE*

Sanchez v. Standard Brands, Inc. 431 F.2d 455, 460 (5th Cir. 1970), for example, the court found that "the legislative history of Title VII is in such a confused state that it is of minimal value in its explication." *See also EEOC v. Missouri Pacific Railroad Company*, 493 F.2d 71, 74 (8th Cir. 1974).

Sylvania, Inc., 447 U.S. 102, 118 (1980); *Chrysler Corp. v Brown*, 441 U.S. 281, 311 (1979). A thorough analysis of Senator Dirksen's remarks in their context fails to clarify what Congress intended when it inserted the phrase "for each working day."

Senator Dirksen explained that the amendment grew out of his concern that the definition might not be sufficiently specific. 110 Cong. Rec. 6450, 7216 (1984)[14]. In particular, the Senator was concerned that agricultural and seasonal employers, who might augment their workforce for only a few weeks of the year, would be subject to Title VII. 110 Cong. Rec. 6450 (1964).

Senator Dirksen later explained that the amendment was intended to exempt such employers:

> [T]he House bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect that the definition of the term "employer" would apply to 25 or more who were employees for each working day, in each of 20 or more calendar weeks, in the current or preceding calendar year.

110 Cong. Rec. 13087 (1964). The phrase "in each of twenty or more calendar weeks" was plainly intended to exempt seasonal employers from Title VII. How the

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[14] Senator Dirksen raised a number of questions concerning the specificity of the definition of employer. 100 Cong. Rec. 6450 (1964). He later drafted a memorandum setting forth his specific questions and concerns. 100 Cong. Rec. 7216-7217 (1964).

phrase "for each working day" also furthers that legislative purpose is entirely unclear.

Petitioners and some of the lower courts[15] have seized upon Senator Dirksen's isolated remark[16] that Congress had borrowed the definition from the Unemployment Act. As at least one lower court has recognized, "Senator Dirksen's assertions . . . are not borne out in the comparison" of the two provisions. *Richardson v. Bedford Place House Phase I Associates*, 855 F.Supp. 366, 369 (N.D. Ga. 1994). The Unemployment Act stated:

> [T]he term "employer" does not include any person unless *on each of some twenty days during the taxable year, each day being in a different calendar week;* the total number of individuals who are *employed by him in employment for some portion of the day* (whether or not at the same moment in time) was four or more."

26 U.S.C. § 3306(a) (1958) (emphasis added). Neither the phrase "for each working day," nor the phrase "in each of twenty or more calendar weeks" appears in the Unemployment Compensation Act. Their conspicuous absence casts serious doubts upon their assumed parentage. But Senator Dirksen had quoted the latter phrase from the

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[15] *E.g., Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-635 (1st Cir. 1983); *see also Vera-Lozano v. International Broadcasting*, 50 F.3d 67, 70 (1st Cir. 1995).

[16] According to the EEOC, the Senate debate on H.R. 7152 spanned 83 days and lasted 534 hours, 1 minute and 37 seconds. *EEOC's Legislative History Of Title VII* at 11. This passing reference seems to be Senator Dirksen's most detailed exposition on the meaning of the phrase "for each working day."

Illinois Fair Employment Practices Act. 110 Cong. Rec. 6450 (1964).[17] The Senator's statement does not constitute such a "clearly expressed legislative intention" to adopt the payroll method to override the plain language of the statute. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). To the contrary, the Senator's isolated remark appears to be something less than accurate, and thus serves as a rather flimsy basis for this Court to undertake a function best left to Congress. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (Jackson, J., concurring) ("casual statements from floor debates [are] not always distinguished for . . . accuracy. . . . ") Senator Humphrey explained the basis for the amendment in terms suggestive of an employers output, stating that once the number of employees exceeds 25 "they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services." 110 Cong. Rec. 13.088 (1964). An employee generates "income or output or . . . goods" only when he is present at work. Thus the phrase "for each working day" evinces an intention to limit the application of Title VII by counting employees only when they are at work.

Petitioners further attempt to divine Congressional intent from a Revenue Ruling that addressed the proper

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[17] The Illinois Fair Employment Practice Act provided:

> (d) "Employer" includes and means all persons, including any labor organization, labor unions, or labor association employing more than 100 persons within the State within each of 20 or more calendar weeks, within either the current or preceding calendar year prior to January 1, 1963.

110 Cong. Rec. 6450 (1964).

method for counting employees under the Unemployment Compensation Act. Rev. Rul. 55-19, 1955-1 C.B. 496-99, *reprinted at* J.A. 80-85. As respondents have demonstrated, petitioners' reliance upon Revenue Ruling 55-19 proceeds from a false premise. Moreover, reliance upon Ruling 55-19 would exalt an administrative interpretation and abrogate the Constitutionally appointed role of the judiciary. Where Congress adopts a *judicially* defined concept, a court is justified in presuming that Congress intended to adopt the judicial interpretation of that concept. *Davis v. Michigan Department of Treasury*, 498 U.S. 803, 813 (1989) Revenue Rulings are not judicial interpretations and they do not have the force of law. *Dixon v. United States*, 381 U.S. 68, 73 (1964). A revenue ruling represents nothing more than the Commissioner's position with respect to a particular factual situation. *E.g., Segel v. Commissioner*, 89 T.C. 816, 847 (1987). Accordingly, Courts have recognized that revenue ruling has no more binding or legal effect than would the opinion of any other lawyer. *Kaiser v. United States*, 262 F.2d 367, 370 (7th Cir. 1958); *Browne v. Commissioner*, 73 T.C. 723, 731 (1980) (Hall, J., concurring)

Because revenue rulings lack the force and effect of law, this Court need not, and indeed should not, adopt the fictitious assumption that Congress intended to adopt the Unemployment Act's interpretation of "employer." Neither Senator Dirksen's comments nor any of the other relevant legislative history show that Congress was aware of Revenue Ruling 55-19, much less that it considered the ruling. Senator Dirksen stated only that he "went through the matter with the Department of Labor and others." 110 Cong. Rec. 13087 (1964) From this remark,

Walters concludes the Senator was aware of Revenue Ruling 55-19. The Department of Labor is not empowered to issue Revenue Rulings. And the Senator did not identify the "others" with whom he conferred. There is simply no foundation for such speculation.

Finally, had Congress in fact considered the import of Revenue Ruling 55-19, it would have reached the inescapable conclusion that the ruling had no binding force or effect whatsoever with regard to the interpretation of the Unemployment Compensation Act. The Introduction to the Cumulative Bulletin for 1955, provided following statement explicit limiting the force and effect of the Commissioner's rulings:

> Revenue Rulings reported in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury Decisions), but as published precedents to be used in the disposition of other cases, and may be cited and relied upon for this purpose. *However, since each published ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved,* Revenue officers *and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same.* In applying rulings, consider the effect of subsequent legislation, regulations, court decisions and rulings.

1955-1 C.B. at 1 (emphasis added). Had Congress searched for a judicial authority that had followed, or even cited the Ruling in 1963, it would have found none. Finally, this Court had already declared that revenue

rulings lacked the force and effect of law. *Bartels v. Birmingham,* 332 U.S. 126, 132 (1947). Thus, Petitioners' suggestion that intended the term "employer" to receive the same interpretation accorded under the Unemployment Act proceeds from an utterly false premise and must be rejected.

Finally, Revenue Ruling 55-19 employed a counting method that is neither internally consistent nor consistent with the petitioners' payroll method. Petitioners cite the ruling as the "settled administrative interpretation" which explained that an employment relationship continues to exist "so long as the parties intend for the employee to continue to work . . . in the future *such that the relationship has not been definitely terminated."* EEOC Brief at 30-31. The ruling addressed the question of how to count an employee who had accrued vacation time at the time he resigned. Rev. Rul. 55-19, 1955-1 C.B. 496, 497 (J.A. 82). According to the IRS, such an individual would be "considered as being in the employ of the employer *during the vacation period." Id.* (emphasis added). The verb "resign" is commonly understood to mean that a person has definitely terminated his or her employment relationship. *See American Heritage Dictionary* 1051 (2d Ed. 1982) (def. 3: defining "resign" to mean "[t]o give up one's job or office; quit, esp. by formal notification.) Counting an employee during the existence of an ongoing employment relationship and doing so after the employee has resigned are irreconcilable. Moreover, whereas the IRS counted both employees for the first week "during the vacation period," petitioners would not count either of them because neither was an employee "for each working day" of that week. *See* Walters' Brief at 22-23. Finally the

approach the IRS followed in Revenue Ruling 55-19 is also inconsistent with the Department of Labor regulations implementing the FMLA which the petitioners cite as additional support for their version of the payroll method.[18]

In the absence of a clear legislative intent to the contrary, the Act of Congress must be applied as written. *E.g., Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The sparse legislative history of the Senate amendment adding the phrase "for each working day" does not provide a clear indication that Congress intended the definition of "employer" to be construed as petitioners suggest.

B. The Legislative History Of The Family And Medical Leave Act Is Not Indicative Of Congressional Intent With Regard To Title VII's Definition Of The Term "Employer."

Petitioners maintain that legislative history of the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, supports the adoption of the payroll method when counting employees under Title VII. Walters further contends that the continued application of the day-by-day approach adopted by the courts below will "unsettle" the interpretation of the Family and Medical Leave Act.

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[18] *See* Walters' Brief at 24-25; EEOC's Brief at 35-36 and n.24; *see also* 29 C.F.R. §§ 825.104(a), 825.105(b)-(e), *reprinted at* Pet. Supp. Br. App. 1a-2a.

The EEOC concedes that the 1993 Senate report accompanying the FMLA cannot serve as a reliable indicator of what Congress intended when it enacted Title VII thirty years earlier. *See* EEOC Brief at 33. This Court has spurned attempts to divine of an earlier congress from legislative action taken by a later congress. *E.g., Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989). Remarks in the subsequent legislative history have been accorded even less consideration. For example, in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court found comments in a Committee Report accompanying the 1978 amendments to the ADEA unpersuasive and insufficient to overcome the plain language Congress had given the ADEA in 1967. *Id.* at 758. As the court of appeals correctly observed, the Senate report upon which petitioners rely is not legislation, but merely subsequent legislative history. 60 F.3d at 1228-29 (95-259 Pet. App. at 8a).

Nevertheless, the EEOC cites the Senate Report as an example of the reasonableness of its interpretation requiring application of the payroll method. Petitioners contend that this Court must construe Title VII's definition in the context of the overall body of antidiscrimination legislation. How courts will construe the definition of "employer" under the FMLA is not before this Court. *See* 60 F.3d at 1230 (95-259 Pet. App. at 11a). It appears that no court has addressed the method of counting employees for purposes of the FMLA. It is reasonable to assume that if and when that issue becomes ripe for

adjudication, the court will adhere to established principles of statutory construction and begin with the language of the statute, not with an excerpt from a Committee Report.

While this Court need not address or interpret the FMLA definition, a plain reading of that definition reveals that it does not dictate the payroll approach as petitioners contend. Petitioners note the apparent similarity between the Title VII definition and the FMLA definition, but overlook several important distinctions between the two. Congress did not adopt the FMLA definition from Title VII *in haec verba* as it did when it enacted the ADEA and the Americans With Disabilities Act. Instead, Congress drafted yet another definition of "employer." 29 U.S.C. § 2611(4)(A). Apart from the obvious numerical difference, Congress substituted the verb "employs" for Title VII's use of the verb "has." *See id.* Thus, the FMLA looks to the number of employees a person "employs . . . for each working day." *See id.* Congress further modified the Title VII definition of "employer" by defining the verb "employ" to include "to suffer or permit to work." 29 U.S.C. § 2611(3).[19] Thus, for purposes of the FMLA, an "employer" is a "person" who "suffer[s] or permit[s]" "50 or more employees" "to work" "for each working day during 20 or more calendar workweeks in the current or preceding calendar year." It is difficult to imagine how an "employer" can "suffer or permit" an "employee" "to work" if the employee is not

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[19] Section 101(c) of the FMLA incorporates the definition of the verb "employ" from Section 3(g) of the Fair Labor Standards Act. 29 U.S.C. § 203(g).

physically present at the workplace, wherever that may be. The day-by-day method of counting employees would also seem to be consistent with the plain language of the FMLA. Consequently, the conflict Walters portends is a false one because the payroll method "fits most logically and comfortably into" the FMLA.

III. This Court Owes No Deference To The EEOC's Interpretation Of Its Own Jurisdiction; That Determination Rests Solely With This Court.

Petitioners suggest that this Court should pay deference to the EEOC's interpretation of the statute because the EEOC is charged with the administration and enforcement of Title VII. The issue before this Court transcends the mere arithmetical counting of employees because Section 701(b) defines the EEOC's jurisdiction. This Court has long recognized that "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Addison v. Holly Hill Co.*, 322 U.S. 607, 616 (1943). Similarly, in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), the Court explained that "[a]n agency may not finally decide the limit of its statutory power. That is a judicial function." *Id.* at 369.

Petitioners attempt to avoid this result, arguing that since Congress authorized the EEOC to provide interpretations and opinions, it must have also intended that the EEOC should make determinations concerning Title VII's coverage. 42 U.S.C. § 2000e-12(b). This argument must fail because section 713(b) of Title VII says nothing concerning the EEOC's authority to determine employer

coverage. It merely provides a safe harbor for persons who rely upon the Commission's guidance concerning the legality of their employment practices or compliance with Title VII's reporting requirements.[20] That Congress authorized the Commission to issue advisory opinions concerning a person's contemplated action, affords no rationale basis to conclude that it also intended the Commission to determine a person's status as an "employer," particularly in light of the longstanding doctrine of *Addison v. Holly Hill Co.*, 322 U.S. 607, 616 (1943). This Court has rejected such bootstrapping. In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), this Court rejected the Commission's interpretation of the scope of its own jurisdiction:

> But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. [Citation omitted.] This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that *an agency may not bootstrap itself into an area in which it has no jurisdiction*. . . .

[20] Section 713(b) affords a defense against "any liability or punishment for on or account of (1) the commission by such person of an unlawful employment practice . . . or (2) the failure of such person to publish and file any information required by any provision of [Title VII]." 42 U.S.C. §§ 2000e-12(b)(1); 2000e-12(b)(2).

Id. at 745 (emphasis added). Paying deference to the EEOC's interpretation would permit the EEOC to bootstrap itself into an area into which Congress never intended the EEOC to tread.

To pay deference to the EEOC's interpretation of the definition of "employer" would be to abdicate this Court's constitutional duty to independently survey the bounds of the EEOC's jurisdiction. Finally, the EEOC's interpretation of Section 701(b) would be especially unwarranted because section 701(b), in conjunction with section 706(f)(3) determines the scope of the district court's jurisdiction as well.

IV. This Court Should Give Little Credence To The Commission's Policy Guidance.

The EEOC concedes, as it must, that Congress did not confer upon it the authority to promulgate rules or regulations. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976).[21] Nevertheless, petitioners contend that this Court owes particular deference to the EEOC's Policy Statement No. N-915-052 (April 20, 1990) (95-259 Pet. App. 30a-40a).[22] The EEOC's guidelines lack the force of law

[21] Section 713(a) of Title VII granted the EEOC limited rulemaking authority that extends only to procedural regulations. *See* 42 U.S.C. 2000e-12(a). The EEOC's regulations implicitly recognize that it lacks the authority to expound on the meaning of terms Congress has already defined. *See* 29 C.F.R. § 1601.2 and § 1601.3 (definitions of various terms including "employer" shall have the meanings set forth in Title VII).

[22] 3 EEOC Compliance Manual (BNA), *Policy Guidance: Whether part-time employees are employees within the meaning of*

and should therefore be accorded less weight than administrative regulations. *Id.*

In *Gilbert*, the Court applied the standard announced in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) to determine how much weight to accord to the EEOC's guideline. In *Skidmore*, the Court explained:

> The weight of such a judgment in a particular case will depend upon the thoroughness of its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 142.

As in *Gilbert*, the EEOC's guideline "does not fare well under these standards." *Id.* The validity of its reasoning is suspect. Petitioners' interpretation demands a strained reading to give meaning to the phrase "for each working day." That reading seems "highly unlikely" (95-259 Pet. App. 6a) and finds no clear support in the legislative history.

Courts have rejected requests for "heightened deference" to an agency's interpretation when the agency's position has been inconsistent. *E.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 4466 n.30 (1987), *quoting Watt v.*

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§ 701(b) of Title VII and § 11(b) of the ADEA, N:3311-N:3316 (95-259 Pet. App. 30a-40a). The "Subject" and "Purpose" of the policy statement reflect confusion between the threshold issue of *whether* a person is an "employee" within the meaning of Section 701(f) who *should* be counted, and the issue before this Court, *viz.*, if so, *how* should the person be counted. *Id.* at N:3313 (95-259 Pet.App.30a).

Alaska, 451 U.S. 259, 273 (1981). Petitioners positions concerning the proper application of the payroll method have been anything but consistent.

Petitioners claim that the interpretation set forth in the EEOC's Policy Guidance dates back to 1966.[23] On closer examination, it appears that the EEOC's current view of the payroll method has not been as long-standing and consistent as petitioners suggest. The EEOC's current Policy Guidance petitioners rely upon was issued on April 20, 1990 – after several courts had rejected the payroll method.[24] The 1990 Policy Guidance was "intended as an amendment and clarification of" the EEOC's earlier interpretation. 95-259 Pet. App. 31a n.1.

Unlike the 1990 Policy Guidance, the EEOC's prior interpretation did not focus on the existence of an employment relationship, but upon the number of days an employee worked. The former interpretation directed investigators to:

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[23] Petitioners cite a May 11, 1996 opinion of the EEOC's general counsel and refer to two other opinion letters that were cited in *Pascutoi v. Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975). Neither the EEOC nor Walters cited the General Counsel Opinions in either the district court or in the court of appeals.

[24] *See Zimmerman v. North American Signal Co.*, 704 F.2d 347, 354 (7th Cir. 1983); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-09 (S.D. Ohio 1989); *Schoenbaum v. Orange County Center for the Performing Arts*, 677 F.Supp. 1036, 1038-39 (C.D. Cal. 1987).

> count the number of people employed during the year of the alleged violation and the preceding year. If respondent *employed* 15 or more employees *for each working day for* 20 or more calendar weeks in either year, respondent is an employer.

1 EEOC Compliance Manual § 605.8(b) *Does Respondent Employ 15 or More Employees* (BNA) 605:021. The common meaning of the verb "employ" is "[t]o engage the services of; put to work." American Heritage Dictionary 450 (2d ed. 1982). Thus, until 1990 the EEOC's interpretation looked to whether a person had "engaged the services of" or "put to work" 15 or more employees "for each working day for 20 or more calendar weeks." Being "put to work" suggests more than merely being in an employment relationship. In common understanding, being "put to work" contemplates nothing short of actually working for an employer.

The Commission's pre-1990 interpretation included an illustration that also focused upon whether the employees actually "*worked* each working day." 1 EEOC Compliance Manual § 605.8(b) 605:021. *Id.* (emphasis added). The example involved a respondent who had "13 regular full-time employees who *worked all year* . . . with the exception of two weeks [*sic*] vacation each." *Id.* (emphasis added). Respondent also employed 10 part-time and temporary employees, six of whom "*worked each working day* during each of 26 weeks" during the year in question. *Id.*[25] (emphasis added). By "[a]dding these six

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[25] The information for this illustration was obtained by requesting, among other information, "[a] list of respondent's

employees to the 13 regular full-time employees," the EEOC determined that the respondent "*employs* 19 individuals and is an employer within the meaning of § 701(b)." *Id.* (emphasis added). Section 605.8(b) of the earlier version of the EEOC's interpretation made no reference to the existence of an "employment relationship." Nor did it suggest that persons who either began or ended their employment relationship during the week should be excluded from the jurisdictional count for the entire week.

Petitioners have also altered their position with respect to the proper application of method during the course of this litigation. Respondents have previously explained this inconsistency in detail and will refrain from needless repetition. In short, petitioners simply counted the number of names that appeared on Metropolitan's payroll for a given week. This application of the payroll method rendered the phrase "for each working day" meaningless. Petitioners appear to have adopted a slightly different application of the payroll method in this

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part-time and temporary employees" indicating "*how many days or partial days per week each employee worked, which weeks each employee worked, and the total number of weeks each worked.*" 1 EEOC Compliance Manual § 605.8(b) *Does Respondent Employ 15 or More Employees?* 605:0022 (emphasis added). Under the EEOC's current interpretation as set forth in its 1990 Policy Guidance, information concerning the EEOC's current position is that "all part-time employees are counted whether they work part of each day or part of each week, as long as they are on the payroll." 95-259 Pet. App. at 34a. Thus, the number of days or partial days a person worked would be of no relevance in determining the number of employees under the EEOC's current Policy Guidance.

Court. An agency interpretation which conflicts with an earlier interpretation is entitled to "considerably less deference" than a view the agency has held consistently. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987), *quoting Watt v. Alaska*, 451 U.S. 259, 273 (1981); *see also General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). A request that this Court defer "to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988).

CONCLUSION

Respondents, Metropolitan Educational Enterprises, Inc. and Leonard Bieber, respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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Nos. 95-259 & 95-779

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DARLENE WALTERS, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

PETITIONERS,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER,

RESPONDENTS.

On Writ of Certiorari
to the United States Court of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONER DARLENE WALTERS

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ARGUMENT

1. By their resounding silence on the issue, respondents concede that the *Zimmerman* test is cumbersome, expensive and time-consuming.

Respondents conspicuously fail to answer petitioners' arguments about the difficulty and expense of the *Zimmerman* method as compared to the ease and speed of the payroll method. *See* Ms. Walters' Brief, Section 5, pp. 40-44.

Indeed, by recounting in their Statement of the Case the time-consuming and duplicative effort to count employees and working days, respondents' failure to make argument on that point reemphasizes that the *Zimmerman* method truly is a morass. *See* respondents' Brief, Statement of the Case, p. 5-7.

2. The arguments of the *amici curiae* about costs and burden are not based on the facts of this case and are incorrect as a matter of general policy.

In contrast, the Brief of the *amici curiae* led by the Illinois Chamber of Commerce argues that the two methods impose equivalent counting burdens. In so arguing, the *amici* detach themselves from the facts of this case, jettison respondents and then float in a netherworld of unsupported generalizations.[1] The arguments of the *amici* are unpersuasive

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[1] Seeking to avoid the obvious fact that respondent Metropolitan is not threatened with extinction by complying with Title VII or defending this case, the *amici* argue with virtually no empirical support (1) that Metropolitan is not a "typical small business," *see* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.* p. 16-17 n. 27; (2) that there is no reason to believe that the work and scheduling practices in this case (*e.g.* flextime and compressed (continued...)

both as a matter of the record in this case and as a matter of general principle.

First, no one -- not even the *amici* -- disputes that the counting process in this case was in fact time-consuming, complex, difficult and expensive.[2]

Second, as a general matter, the parameters of the *Zimmerman* test necessarily impose complexity on the counting process by distinguishing between the type of workers (full-time or part-time), their presence at work, whether they are on paid or unpaid leave status and so on. The *amici* attempt to camouflage this point by arguing that most small businesses already keep routine payroll records on which the employee counts can be based. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 19. However, the question is not whether the raw material -- *i.e.* time cards and the like -- already exists. Rather the question is whether sensible judicial policy should require a quick and easy, or a complex and time-consuming, analysis of whatever records do exist.

Moreover, as pointed out in Ms. Walters' opening Brief, the questions reserved by *Zimmerman* for later decision show as a matter of principle that the *Zimmerman* method is unduly

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[1](...continued)
workweeks) are widespread in smaller workplaces, *Id.* at pp. 16-17, and (3) that respondents' ability to afford this litigation is the exception among small businesses. *Id.* at p. 9 n. 12.

[2] In a footnote, the Chamber of Commerce *amici* concede the difficulty encountered by the parties herein, but assert, also without explanation, that those difficulties were atypical. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 18 n. 28.

complex.[3] Ms. Walters opening Brief, p. 26. Those complex unanswered questions would sprout in full bloom from the *Zimmerman* method, thus creating a new cottage industry of interpretation of the jurisdictional definitions in Title VII and the three other virtually identical anti-discrimination statutes. In contrast, adoption of the payroll method would conclusively end the matter and leave the courts to apply a simple quick test and then either terminate the case for lack of jurisdiction or proceed to the merits.

In essence, the *amici* seek to resurrect policy issues laid to rest by the Congress that crafted this definition into Title VII. As demonstrated in Ms. Walters' opening Brief, Congress reconciled the competing policy concerns raised by the *amici* by enacting a jurisdictional test that is based only on the number of employees during discrete time periods of the calendar year. Contrary to the suggestions of the *amici*, *see* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 23, nothing in Section 701(b) measures the size of an employer's business or the size of its total workforce. The only test is the number of employees an employer "has" "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

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[3] *Zimmerman* reserved on the following questions: how to count "hourly paid workers on paid leave," how to count "hourly paid workers on non-paid standby status," and how to count "salaried workers" 704 F.2d at 354 n. 6.

3. The arguments of the *amici curiae* about burden on small business are inconsistent, self-defeating and contrary to common sense.

Moreover, the *amici's* cost/burden arguments are internally inconsistent, self-defeating and nonsensical.

The *amici* urge the Court to adopt a cumbersome, complex, expensive and time-consuming jurisdictional test in order to protect small businesses from the burden and "potentially ruinous" costs of complying with civil rights laws and defending discrimination charges. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 9 n. 12. The self-contradiction is apparent.

One would think that the business community would join in petitioners' call for the simplest and quickest jurisdictional test. One would think that small businesses would hunger for an easy way to determine coverage before making employment decisions in the first instance, and in defending discrimination charges in the second.

Instead, the *amici* tout the Internal Revenue Code as an appropriate model to guide this Court's interpretation. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 18 ("[H]istory tells us that Congress is not adverse to making calculations complex . . . *[s]ee e.g.*, substantial portions of the Internal Revenue Code").

Without intending to demean the federal tax code, Ms. Walters suggests that this argument by the *amici* is unusual, to say the least. The argument is the more peculiar because respondents and the *amici* do not respond to the argument of Ms. Walters' opening Brief about the apportionment of costs under the fee shifting provisions of Title VII -- *i.e.* that an employer respondent who loses an expensive jurisdictional

fight and then the merits will pay the prevailing employee's costs and fees for that fight. *See* Ms. Walters' opening Brief, Section 5c, pp. 43-44.

Thus, by direct implication from what the *amici* say and do not say, it appears that they advocate complexity and expense in construing this statute.

Perhaps the *amici's* preference for the more expensive and cumbersome test reflects an acceptance of the associated costs as a matter of tactics. After all, even a small business is better able than an individual Title VII claimant to withstand compliance and litigation costs. Perhaps the business community recognizes that a complex jurisdictional test is another difficult barrier for a Title VII claimant to overcome, especially since it is the employer who controls the records required for the jurisdictional count but the employee who has the burden of establishing jurisdiction.

Indeed, contrary to the *amici's* argument, the issue here is in large part whether to allow small businesses to discriminate. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 8. Both the Congress that enacted Title VII and the Congress that in 1972 reduced the threshold number of employees to fifteen stated as much. As the 1971 House Report on the reduction states, "The committee feels discrimination is contrary to national policy and equally invidious whether practiced by a small or large employer. . . ." H.R.Rep. No. 92-238, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155.

But, whatever the underlying purpose of the *amici* in taking such a strange position, their arguments about costs and burdens are almost complete nonsense. The complexity and expense of the *Zimmerman* method is reason enough to reject

it.

4. Respondents also ignore the fact that the *Zimmerman* method creates irrational extra-statutory distinctions between employees.

Respondents ignore another of petitioners' arguments: that the *Zimmerman* method creates irrational distinctions between employees, distinctions that find no basis in the statutory text or legislative history. *See* Ms. Walters' opening Brief, Section 2d & 2g, pp. 25-26 & 29-30.

Respondents do not answer these arguments and do not justify the irrational distinctions of the *Zimmerman* method -- for example, between salaried and hourly and full-time and part-time employees, or between employees on flextime or weekend schedules. Nor do respondents attempt to tie these distinctions to the statutory language or history.

By their silence, respondents concede that those distinctions cannot be justified and that the *Zimmerman* method is nonsensical.

5. Respondents' new arguments about mid-week employment changes demonstrate that the payroll method gives full meaning to the phrase "for each working day."

Respondents make an entirely new argument in this Court, not raised in the two courts below, that petitioners' application of the payroll method in the courts below is at odds with petitioners' position in this Court. *See* respondents' Brief, Section IB, pp. 12-16. Respondents argue that petitioners include on the weekly payroll employees who entered or left Metropolitan's employ midweek when in fact those employees should not be counted on the weekdays before they begin, or

after they end, employment.

Respondents' new argument is nonsense. Any fine tuning of the counts of weeks involving midweek employment changes should be left to the district court on remand after this Court adopts the payroll method of counting.

In any event, even conceding the correctness of respondents' new argument, the recount of the weeks in which midweek employment changes occurred demonstrates conclusively that midweek employment changes do give real meaning to the phrase "for each working day." *See* respondents' Brief, pp. 12-16 *esp.* note 8. In each of those weeks, the midweek employment changes reduce the number of employees "for each working day" below the fifteen employee minimum, thus eliminating eight weeks from the jurisdictional count. This reduces the total number of calendar weeks that meet the jurisdictional minimum from forty-seven to thirty-nine weeks, still well above Section 701(b)'s minimum twenty week requirement.

Thus, respondents' re-analysis demonstrates that midweek employment changes give real meaning to the phrase "for each working day" by reducing the jurisdictional weeks in this case by a real and significant though not determinative number.[4]

Thereby, respondents completely demolish their own argument that the payroll method makes that phrase

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[4] Indeed, the *amici curiae* led by the Illinois Chamber of Commerce backhandedly but still explicitly concede that midweek employment changes "gives meaning to the phrase 'for each working day'. . . ." *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 22.

superfluous.

6. The suggestions of the *amici curiae* about an increased caseload arising from the payroll method are completely misplaced.

The *amici curiae* led by the Illinois Chamber of Commerce rather coyly forecast a flood of new cases from the payroll method. In fact, contrary to those forecasts, the payroll method will not exacerbate the anti-discrimination caseload of the EEOC and federal courts, it will ease it.

First, the *amici* miscite business census statistics, arguing that the payroll test somehow will bring employers with ten to nineteen employees within Title VI's coverage. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, pp. 10-11 n. 17 and accompanying text. This is almost inexcusable nonsense. The numerical threshold of Section 701(b) is fifteen and that threshold is further limited by working day and calendar week limitations. It is difficult to understand how statistics pertaining to employers with ten to fourteen employees enlighten this case. An employer with fourteen or less employees is never covered, under either test. Moreover, a significant part of the remaining employers -- those with fifteen to nineteen employees -- probably fall within Section 701(b) under either test. The really important part of the issue presented is whether that probable coverage should be determined under the time-consuming *Zimmerman* method, clogging the EEOC and the courts with an excruciating counting process, or under the quick and easy payroll method.

Second, judicial and agency experience after the lower court decisions adopting the payroll method reveals no increase of new small business cases. There was no such deluge in the Northeast after the First Circuit's decision in *Thurber*. And

there was not even a trickle of new cases after the decisions of the district courts that adopted the payroll method.

Indeed, in opposing the *certiorari* petitions, respondents vigorously argued that the issue presented was not of sufficient importance because "this case, and those like it are anomalies," and because "[i]n the more than 30 years since Title VII became law, the issue before this Court has arisen in only 15 reported decisions." *See* respondents' Brief in Opposition to Petitions for Certiorari, p 10.

Thus, the *amici's* flood warning is entirely unjustified. This case will effect a relatively narrow band of cases, those involving discrimination claims against employers that hover around the jurisdictional threshold in that they had fifteen employees on each working day of at least twenty calendar weeks, *etc.* As this case demonstrates, the employer would necessarily have to have at least fifteen employees on the payroll for at least those twenty weeks. Jurisdiction over those cases should be determined under the quick and easy payroll method.

7. Adopting the broad interpretation of the exclusion as urged by respondents and the *amici curiae* is entirely unsupported in the case law and is a dangerous interpretive principle.

Respondents argue that this Court should construe Section 701(b) "strictly" so as not to expand federal subject matter jurisdiction. *See* respondents' Brief, Section IC, pp. 16-18. The Brief of the *amici* led of the Illinois Chamber of Commerce argues that this definitional provision of Title VII is a small business "exclusion" which should be construed to exclude as many businesses as possible. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, pp. 7-9. Both

arguments are unwarranted under existing authority and are extraordinarily dangerous to the entire federal scheme of anti-discrimination laws.

The so-called small business "exclusion" of Section 701(b) is explicitly defined in terms of a certain number of employees. Thus, construing the so-called small business exclusion broadly requires the Court to exclude from coverage the very persons who are the intended beneficiaries of Title VII -- women and minorities. This would be a startling step in view of the developed body of Supreme Court and circuit and district court jurisprudence that Title VII and similar remedial anti-discrimination statutes should be construed broadly consistent with their humanitarian purposes. *Gomez v. Toledo*, 446 U.S. 635, 639 (1980); *Thurber v. Jack Reilly's Inc.*, 717 F.2d 633, 635 (1st Cir. 1983) ("[T]he prevailing majority in Congress intended to give [Title VII] broad effect."); *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979); and *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1326-27 (D. Minn. 1975), *aff'd*, 566 F.2d 1178 (8th Cir. 1977). *See also Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994) (Title VII's definition of employer should be interpreted liberally); *Trevino v. Celanese Corp.*, 701 F.2d 397, 403 (5th Cir. 1983) (same); *Armbruster v. Quinn*, 711 F.2d 1332, 1341 (6th Cir. 1983) (resolve any ambiguities in Title VII's definition of employee in favor of coverage); *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir.1980) (Title VII's definition of "employer" construed liberally to effectuate statute's humanitarian purpose); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977) (same).

In any event, a debate of this issue of exclusion/inclusion is completely unnecessary in this case

because, as petitioners demonstrate in their opening Briefs, the plain language of Section 701(b), its legislative history, sound judicial policy and the need for coherence among related statutory schemes, command the use of the payroll method.

8. The arguments of respondents and the *amici curiae* about the legislative history are completely unpersuasive.

Respondents and the *amici curiae* go to great lengths to escape the clear legislative history that supports the payroll method. *See* respondents' Brief, Section II, pp. 18-30; and Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, Section III, pp. 24-28. Their arguments are entirely unpersuasive.

First, contrary to respondents' suggestions, Senator Dirksen was neither an isolated legislator or an opponent; he was the author and sponsor of the language at issue, and thus his remarks are of weighty significance. Respondents ignore this Court's long established rule that "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.* 341 U.S. 384, 394-95 (1951)).

Second, the remarks by Senator Dirksen are the more significant because the language at issue came from a floor amendment, not from Committee or Conference Report. Therefore, this is the only legislative history available to examine, a product of the controversial nature of the Civil Rights Act of 1964 and the unusual legislative process that led to it.

Third, respondents and the *amici* unsuccessfully seek to avoid the obvious fact that Senator Dirksen modeled Title VII's

definition of employer on the Unemployment Compensation Act which had by then been long construed by the IRS under the payroll method. *See* Ms. Walters' opening Brief, Section 3b, pp. 31-38. Respondents argue that Senator Dirksen was wrong when he said that the definition was modeled on the UCA. *See* respondents' Brief, p. 26 (Senator Dirksen's remark "appears to be something less than accurate."). The *amici* led by the Illinois Chamber of Commerce argue that the UCA's language was much different in that it used the phrase "employed . . . in employment." *See* Brief of *amici curiae* Illinois Chamber of Commerce *et al.*, p. 25.

Both arguments are unpersuasive in the extreme. Given the searing controversy about, and the intense opposition to, the civil rights legislation being considered by the Congress in 1964, the experienced Minority Leader, the Senator from Illinois, Everett McKinley Dirksen, speaking for himself, Majority Leader Mansfield and several other sponsoring or supporting Senators, surely knew what he was talking about. No further citations or argument should be needed to establish that point.

As for the language difference between the UCA and Title VII's definition, it is precisely petitioners' point that the UCA language and administrative interpretation strongly adopted the payroll method, which the Congress engrafted into Section 701(b) in somewhat different words. It is precisely petitioners' point that the UCA's phrase "employed . . . in employment" "on each of some twenty days . . ." has the same essential meaning has Section 701(b)'s phrase "a person . . . who has fifteen or more employees for each working day in each of twenty or more calendar weeks . . . ." Both focus on the employment relationship.

Finally, respondents' argument that the IRS

interpretation of the UCA did not have the force of law and was not binding on Congress is equally as meritless. *See* respondents' Brief, pp. 26-30. Petitioners do not argue that Congress was "bound" by the IRS interpretation. Petitioners simply contend that Congress was aware of that clear unambiguous agency interpretation and intended to craft it into Section 701(b).

In conclusion, Ms. Walters notes that even the Seventh Circuit in this case agreed that "certain remarks of Senator Dirksen are consistent with [petitioners]' argument." 60 F.3d at 1227 n. 3 (Pet. App 5a). The arguments of respondents and the *amici* that the legislative history does not support the payroll method are widely off the mark.

9. The arguments of respondents and the *amici curiae* about the other anti-discrimination laws containing identical definitions, and their underlying legislative history, completely miss the point.

Next, petitioners do not argue, as respondents and the *amici* erroneously suggest, that the legislative history and text of the ADEA, FMLA and ADA control the construction and legislative history of Title VII. *See* respondents' Brief, Section IIB, pp. 30-33; and Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, pp. 26-28.

Instead, petitioners argue that the text and legislative history show (1) the reasonableness of the payroll method, (2) that Congresses subsequent to that which passed Title VII have continued to use identical or virtually identical language to define employer and intend that the definition be construed under the payroll method, and (3) that given those subsequent legislative developments, adoption of the *Zimmerman* method would drastically unsettle the construction of those closely

related schemes.

Respondents give the Court no reasoned response to those arguments, arguing only that the construction of the FMLA is not presented by this case, *see* respondents' Brief, Section IIB, pp. 30-33. The *amici* led by the Illinois Chamber of Commerce focus on immaterial differences between the FMLA and Section 701(b) -- the employee threshold and exclusions. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, p. 28. Both respondents and the *amici* simply ignore the clear legislative history and agency interpretation of the FMLA adopting the payroll method. *See* Ms. Walters' opening Brief, Section 2c, pp. 24-25.

By their silence, and apparently as a corollary to their affection for the complexity of the tax code, *see* Argument, *supra*, Section 3, pp. 4-5, respondents and the *amici* invite the Court to unsettle these closely related schemes and thereby infuse conflict, confusion, difficulty and expense into the whole federal anti-discrimination law.

Similarly, the response of the *amici* to Ms. Walters's workplace statistics is misplaced. *See* Brief of *amici curiae* Illinois Chamber of Commerce, *et al.*, Section ID, p. 15-17.

First, Ms. Walters' workplace statistics are not limited to the 1990s. *See* Ms. Walters' opening Brief, Section 2f, pp. 27-29. Her tabular breakdown of the participation rate of married women includes comparative statistics from 1960 to 1994. *Id.* at p. 28. That breakdown shows the drastic increase in the participation rate of a specific group of workers explicitly targeted by the 1964 Congress, thus proving the continued and increased need for Title VII's protections.

Second, the point of Ms. Walters' other statistics was simple: that Title VII should not be encrusted in an outdated

conception of the American workplace. It is a dangerous and unwise thing when our laws do not fit the social phenomenon they are designed to govern. It is no answer to suggest that Congress can simply amend Title VII if the courts shackle it in an unworkable test. Such amendments are no simple matter. The wiser judicial course is to attempt to craft a workable, sensible jurisdictional test that flows from the plain text of the statute and serves its clear legislative purpose while meeting the realities of today and tomorrow. This Court has the opportunity to accomplish just such a desirable goal by adopting the payroll method.

10. The gaps in state anti-discrimination law coverage demonstrate why the broader application of the payroll method is required.

Next, there is no merit to the argument of the *amici* led by the Illinois Chamber of Commerce that any gaps of coverage of Title VII are filled by state anti-discrimination laws. *See* Brief of *amici curiae* Illinois Chamber of Commerce, Section IC, pp. 11-15.

First and foremost, this is a case involving the interpretation of a federal law. The existence or non-existence of the patchwork of state laws is beside the point.

Second, the *amici's* state law canvass demonstrates that three states have no anti-discrimination laws applicable to private employers and that the laws of another nine states include the "for each working day" phrase at issue in this case. *Id.*, pp. 12-13 ns. 20-22. Thus, if this Court adopts the *Zimmerman* method, employees working in businesses excluded by the *Zimmerman* counting method would have no anti-discrimination protections in those twelve states. This alone justifies extending the Title VII's definition of employer

as far as possible consistent with the original federal legislative intent.

Third, the *amici's* arguments of cost and burden are demolished by the fact that the anti-discrimination laws of many states cover employers with fewer than fifteen employees. The few additional employers that would be covered by Title VII under the payroll test would be covered under those state laws anyway and thus would be required to comply with anti-discrimination schemes and defend such cases in any event. Dual federal/state coverage already exists for larger businesses and is well established in the law, and the deferral and work sharing agreements of the EEOC with state agencies minimize any duplicative expense of that overlapping jurisdiction. *See e.g.* 29 C.F.R. § 1601.13. Thus, the payroll method would bring this dual coverage to a few employers already covered under state laws. The simplicity and ease of the payroll method is well worth the extension of Title VII to those few additional employers.

In sum, the patchwork of state anti-discrimination laws is a strong argument **against** the *Zimmerman* method.

CONCLUSION

Petitioner Darlene Walters respectfully asks this Court to reverse the judgment of the Seventh Circuit, to find that Metropolitan was an employer within the meaning of Section 701(b) of the Title VII of the Civil Rights Act of 1964, and to remand this case to the lower courts for full proceedings on the merits.

Respectfully submitted,

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Nos. 95-779 and 95-259

In the Supreme Court of the United States

OCTOBER TERM, 1995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER

DARLENE WALTERS, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-779

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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1. a. Respondents' principal argument (Resp. Br. 8, 9, 10-11) is that the Court should reject the EEOC's interpretation of the definition of "employer" in Title VII, 42 U.S.C. 2000e(b), because, in respondents' view, that interpretation renders meaningless the phrase "for each working day" which is contained

in the statutory definition.[1] That argument is incorrect. As we explain in our opening brief (EEOC Br. 22), the EEOC's interpretation gives meaning to that phrase: Because of the phrase, an employer is not covered by Title VII unless the employer has 15 or more employees on his payroll for *each working day* of 20 weeks in a year; it is not sufficient for the employer to have 15 different employees during the course of the entire week if he has fewer than 15 on his payroll for any day of the week.

Congress has, moreover, clearly demonstrated that it believes that the EEOC's interpretation gives meaning to the phrase. Congress included the same phrase in the definition of "employer" in the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.* The Senate Report accompanying that legislation stated that the definition of "employer" in the FMLA was intended to receive the same interpretation given by the EEOC to the "employer" definition in Title VII. The Report explained that "part-time employees and employees on leaves of absence would be counted as 'employed for each working day' so long as they are on the employer's payroll for each day of the workweek. On the other hand, an employee who begins employment, i.e., is added to the employer's payroll, after the beginning of a workweek, or who terminates employment prior to

[1] Section 2000e(b) provides, in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * *.

42 U.S.C. 2000e(b).

the end of the workweek, will not count as being employed on 'each working day' of such week." S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993).[2] See also *McLeod* v. *City of Newton*, Civ. A. No. CV-95-A-1573-S, 1996 WL 405738, at *3 (M.D. Ala. July 12, 1996) (adopting First Circuit's payroll interpretation in a Title VII case, specifically noting that "[t]he words 'for each working day' are not rendered superfluous" by the payroll interpretation).[3]

In fact, both the EEOC's and respondents' interpretations of Section 2000e(b) give meaning to the phrase "for each working day." Both require a determination of the number of employees that an employer "has" on each working day of a week. The difference is that the EEOC makes that determination by count-

[2] Respondents contend (Resp. Br. 32) that, contrary to Congress's expressed intent, the payroll method of counting employees that is applied by the EEOC is not required under the FMLA. Respondents point to the fact that, in the FMLA, Congress used the phrase "employs * * * for each working day" rather than "has * * * for each working day." Compare 29 U.S.C. 2611(4)(A) with 42 U.S.C. 2000e(b). Respondents assert that, in light of the use of the verb "employ," which includes "permit[ting] to work," see 29 U.S.C. 2611(3) (referencing 29 U.S.C. 203(g)), the FMLA should be interpreted as counting only employees who are physically present at the work site. Resp. Br. 32-33. Both Section 2000e(b) and the employer definition in the FMLA, however, focus on the maintenance of an employment relationship by requiring that an employer "have" or "employ" a certain number of employees for each working day of the week. The payroll method of counting employees properly addresses that requirement.

[3] Respondents' suggestion (Resp. Br. 17-18) that petitioners' interpretation expands federal subject matter jurisdiction is based on their erroneous premise that petitioners' interpretation construes the definition of "employer" in Title VII more broadly than the statutory text permits.

ing the employees on the employer's payroll for each working day in that week, whereas respondents would take attendance for each working day in the week and then add to that total the number of hourly paid employees on paid leave on each working day, as well as any salaried employees not yet counted (including those on any type of leave).[4]

b. Respondents also claim (Resp. Br. 8, 12-16, 39-40) that petitioners applied the payroll method differently in the courts below and failed to give effect to the phrase "for each working day." Respondents point out that the weekly payroll summaries included in the record (J.A. 28-79) indicate the number of employees on respondents' weekly payroll. For purposes of that count, some employees, whose first or last day at work was in the middle of a week, were included in the count for each day of the week. Under the EEOC's payroll method, if any of those employees was added to or removed from the payroll in midweek, the employee should have been counted toward the daily employee count only on the days on which the employee was on the payroll. The summaries do not permit such a determination because they do not

[4] Respondents do not address the irrationalities inherent in their counting method—*e.g.*, that hourly paid employees are treated differently from salaried employees; that some part-time employees are counted each day because they work a minimum amount of time each day whereas some full-time employees are counted for a lesser number of days despite the fact that they work significantly more hours in fewer days; that hourly paid employees on their regular day off are not counted on that day regardless of the fact that their employment relationship precludes them from working for a competitor on that day or that they must be available as a replacement employee if necessary on their off days.

indicate when an employee was added to or removed from respondents' payroll.[5]

The summaries in the record in this case are complete for purposes of applying the counting method that the parties were bound to apply below under existing Seventh Circuit precedent. The parties did not focus in the courts below on how to count employees who were added to or removed from respondents' payroll midweek. The EEOC's analysis of how to count employees focused on employees who were "maintained" on the employer's payroll for the given week and employees who were at work the day before their absence and expected to show up the following day, including two specific part-time employees who

[5] Although respondents refer to "midweek employment changes," Resp. Br. 14 n.7, it is not clear from the summaries that those changes involved payroll changes. For example, the summaries show that James Frawley, a full-time employee, worked four or five working days during each of the first eight weeks of the calendar year and received five days of vacation pay during the ninth week. J.A. 28-36. He is not listed at all in the tenth week. J.A. 37. Mr. Frawley reappears on the first day of the eleventh week and is listed as working five days that week, as well as the first two working days of the twelfth week. J.A. 38-39. He is not listed at all in the thirteenth week. J.A. 40. In the fourteenth week, he is listed as working only on Monday, and that is the final record for him. J.A. 41. It is unclear from these summaries whether Mr. Frawley was on unpaid leave, but still on the payroll, during any part of the time he was not listed as working or on paid leave. It also is unclear, for example, whether during the twelfth week he was taken off the payroll after the two days he worked, or whether he remained on the payroll until the end of the twelfth week and was removed from the payroll for the thirteenth week, or whether he remained on the payroll without working during the thirteenth week and was removed from the payroll after his final day of work in the fourteenth week.

were on respondents' payroll for the entire year. See EEOC's Memorandum in Opposition to Defendant's Motion to Dismiss 2, 4, 5, 10, 11, 13-14, 15; EEOC C.A. Br. 5, 6-7, 9, 10, 13, 17 n.16, 21; J.A. 23. This focus did not lend itself to consideration of circumstances where an employee is added to or removed from the payroll midweek.[6] The facts of this case, moreover, do not require resolution of that issue. Even if every week involving a midweek employment change were excluded, the total number of weeks during which respondents had 15 or more employees for each working day would still exceed 20 weeks, making respondents "employers" within the meaning of Section 2000e(b).

c. Respondents urge (Resp. Br. 11-12) the Court to adopt their interpretation of Section 2000e(b) because they believe that it is the counting method that an employer "would probably adopt" if asked how many employees he has for each working day in a given calendar week. Respondents do not explain why they believe this to be true. Nor do they provide a reason for believing that an employer would use a counting method different from the method the employer would use to respond to the question of how many employees he has on a given day. Respondents concede, however, that the latter question would prompt an employer to use the payroll method of counting (see Resp. Br. 11). As respondents state in their brief, that "count would include each hourly-paid employee, *whether he*

[6] When the issue of midweek changes in a payroll was mentioned on appeal, the EEOC discussed the FMLA approach and urged the same approach under Title VII, consistent with the EEOC's current interpretation. See EEOC C.A. Br. 17 & n.16.

worked that day or not, and if so, without regard to the number of hours worked. This counting method would necessarily exclude any individual who was not in an employment relationship with the employer on a given day. Thus, persons who had not yet begun, or who had already terminated their employment relationship with the employer, would not be counted. If the employer repeated this process for each working day of a given week, the resulting tall[ies] would include each hourly-paid employee with whom the employer had an employment relationship without regard to the number [of] days or hours that employee actually worked during the week." *Ibid.* (emphasis added).[7]

2. Respondents assert (Resp. Br. 8, 18-30) that the legislative history surrounding the relevant phrases in the definition of employer in Title VII is sparse, but reveals a congressional intent to "count hourly-paid workers only when they actually work." *Id.* at

[7] The one situation in which an employer might be prompted to use a different counting method is if he were simply asked whether he had 15 or more employees for a given week, without the qualifying phrase "for each working day" of the week. The employer would likely total the number of employees over the entire week without regard to which, or how many, employees worked on which days. For example, if an employer hired 25 inventory specialists on a one-time basis to conduct annual inventory and put them on the payroll for Monday and Tuesday, and the payroll returned to the employer's 10 regular employees on Wednesday, Thursday and Friday, the employer would respond that he had 15 or more employees that week. If, however, he were asked whether he had 15 or more employees for each working day of that week, his answer would be negative.

19.[8] The only statement they cite to support that assertion is a statement by Senator Humphrey that, once employers have more than 25 employees, "they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services." *Id.* at 26 (quoting 110 Cong. Rec. 13,088 (1964)). From this, respondents infer that Congress intended that only employees at work on a particular day should be counted because only those employees generate "income or output or * * * goods" on that day. *Ibid.* That interpretation is inconsistent with the court of appeals' ruling and respondents' own interpretation, both of which count salaried employees on all days regardless of their work schedules and count hourly paid employees on days that they are on paid leave. In both circumstances, those employees are counted on days that they do not generate any income, output, or goods. Moreover, respondents omit the second part of Senator Humphrey's statement, cited in our opening brief (EEOC Br. 31 n.22), explaining that employers with more than 25 employees "also lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13,088 (1964). To the extent the size of an employer is based on the

[8] Elsewhere, respondents claim (Resp. Br. 19-24), somewhat inconsistently, that, because Congress did not draft any committee reports, the legislative history of Title VII is of lesser authority and does not reflect the understanding of Congress. As we explain in our opening brief, this legislation was enacted under unique circumstances, attracted an exceptionally high level of attention, and engendered lengthy debate over its coverage provisions. See EEOC Br. 23-32, 25 & n.18. In such circumstances, statements during the floor debate, especially statements by the authors of the relevant provision, are as authoritative as a committee report.

fact that an employer with fewer employees has a more intimate, personal character, the relevant employees to be counted are those with whom the employer maintains an employment relationship, not those that report to work on a particular day.

Respondents expend (Resp. Br. 23-30) a significant amount of effort attempting to diminish the significance of Senator Dirksen's statement that his amendment of the definition of "employer," to apply where there are 25 or more employees "for each working day in each of twenty or more calendar weeks," was based on the federal unemployment compensation act. Respondents' assertions do not change the fact that, in 1964, at the time of enactment of Section 2000e(b), the settled administrative interpretation of the unemployment compensation act's "employer" coverage provision was set forth in Revenue Ruling 55-19, 1955-1 C.B. 496, *reprinted at* J.A. 80-85. That ruling interpreted an "employer" coverage provision to count, among the requisite individuals employed "on each of some 20 days during the taxable year," all "regular employees" who maintained an employment relationship with the employer, even on days when those employees are "absen[t] from duty" and "perform[] no physical service for the employer." J.A. 81. This interpretation was based on the conclusion that "the employer-employee relationship which exists between the parties does not terminate by reason of their absence from duty for 1 or 2 days during the week. If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week." *Ibid.* Respondents point to nothing in the unemployment compensation act referred to by Senator Dirksen, one of the authors of the statutory language

at issue here, to support the contrary interpretation they urge.

3. Respondents argue (Resp. Br. 33-40) that the Court owes no deference to the EEOC's interpretation of Section 2000e(b) because that provision defines the jurisdiction of the EEOC, and the EEOC cannot interpret its own jurisdiction. Agencies, however, necessarily must address questions concerning the scope of their jurisdiction under the statutes they administer. And this Court has repeatedly held that deference to agency interpretation is appropriate in that context, as exemplified by a line of cases deferring to the National Labor Relations Board's interpretation of the statutory definition of "employee" covered by the National Labor Relations Act. See *Holly Farms Corp.* v. *NLRB*, 116 S. Ct. 1396, 1400-1402 (1996); *NLRB* v. *Town & Country Elec., Inc.*, 116 S. Ct. 450, 453-454 (1995); *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944). See also, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-135 (1985) (deferring to Corps of Engineers' interpretation of "waters of the United States" within the Corps' jurisdiction under the Clean Water Act as extending to certain wetlands).

In any event, as explained above and in our opening brief, the EEOC correctly interprets the statutory language in light of the statutory text and Title VII's overall structure, purpose, and history. The Court should adopt that interpretation based on the same factors and need not address any questions of deference. To the extent the Court finds Section 2000e(b) to be ambiguous, however, the EEOC's reasonable interpretation of that provision is entitled to deference.

Respondents also contend (Resp. Br. 35-36) that the EEOC's interpretation of Section 2000e(b) is not entitled to deference because the EEOC does not have authority "to promulgate rules or regulations." Respondents ignore the fact that the EEOC has explicit statutory authority to issue substantive regulations under the Age Discrimination in Employment Act of 1967 (ADEA), see 29 U.S.C. 628, and that the EEOC interprets the "employer" definition of the ADEA, 29 U.S.C. 630(b), which is identical in relevant respects to the "employer" definition in Title VII, in the same manner as it interprets Title VII's definition of "employer." See EEOC Br. 35 & n.24. That interpretation "is based on a permissible construction" of the identical statutory language and reflects "a reasonable policy choice for the agency to make," and thus warrants judicial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984).

Respondents err in stating that the EEOC's interpretation has not been consistent.[9] They compare the

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[9] Respondents also err in stating (Resp. Br. 37 n.23) that the EEOC did not cite the General Counsel opinions in the courts below. In contending in the court of appeals that the EEOC has formally and consistently interpreted the employer definitions in Title VII and the ADEA according to the payroll method, the EEOC cited not only its 1990 policy guidance, but also authority that had relied on two of the General Counsel opinions. See EEOC C.A. Reply Br. 17 n.12 (citing EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311 (Apr. 20, 1990)); *Pascutoi* v. *Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1326 (D. Minn. 1975) (citing 1966 opinions of EEOC General Counsel stating "that the crucial test is how many employees are on the payroll during the

EEOC's 1990 policy guidance with a provision in an earlier investigator's manual regarding what type of information EEOC investigators should collect to determine whether an employer employed the requisite number of employees. That investigators' manual passage used the term "employ," and included an illustration discussing what employees "worked" each working day and how to count them. Respondents claim that the passage reflected an interpretation different from the payroll approach. The investigators' manual is not a good source for the EEOC's interpretation in this instance, however, because the manual applied to investigators in all jurisdictions in the country, including the jurisdictions in which there already was binding authority applying the daily attendance method. More significantly, the passage simply was not focused on the question whether presence on a payroll for a particular working day warranted being counted for that day, nor was it focused on the question of how to count an employee who is added to or removed from a payroll midweek. There is no suggestion that it was intended as an announcement of a departure from the EEOC's interpretation, which dated back to 1966, that "[t]he term 'employees for each working day' * * * refers to persons on the payroll and regularly employed, not to the number of persons at work on any given day." EEOC, *First Annual Digest of Legal Interpretations of Title VII of the Civil Rights Act of 1964* (1966), citing a May 11, 1966, General Counsel opinion. In any event, even if the EEOC's interpretation of the definition of "employer" for purposes of Title VII and

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crucial 20-week periods and not how many are at work on a given day").

the ADEA had changed over time, that would not mean that judicial deference was not due the EEOC's present interpretation. See *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996) ("mere fact that an agency interpretation contradicts a prior agency position is not fatal").

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Nos. 95-259 and 95-779

In the Supreme Court of the United States

OCTOBER TERM, 1995

DARLENE WALTERS AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioners,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was founded in 1963 by leaders of the American bar, at the request of President Kennedy, to involve private attorneys throughout the country in the national effort to assure to all Americans the protections of the civil rights laws. Through the Lawyers'

Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C., hundreds of lawyers from many of the nation's leading law firms have joined to represent many thousands of victims of discrimination across the country in cases brought under Title VII of the Civil Rights Act of 1964 and under the other civil rights laws. The Lawyers' Committee has a longstanding interest in the coverage and effective and efficient enforcement of Title VII and other civil rights laws.[1]

SUMMARY OF ARGUMENT

The only employers covered by Title VII are those who "ha[ve]" at least fifteen employees for a limited part of the year. How best to apply that fifteen-employee minimum cannot be determined solely by reference to the words of the statute. This Court will be forced to choose between a coverage test that relies heavily upon the existence of a regular and continuing employer-employee relationship and a test that emphasizes either payment or physical presence on the job. The former test is easy to understand and apply and deals effectively with the many variations of employment arrangements that are common to relatively small businesses. The latter requires time-consuming and expensive record-keeping and analysis, and still produces bizarre results. The Court should adopt the "payroll method" formulated by the EEOC and approved by two courts of appeals, and reverse the decision below.

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[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

ARGUMENT

I. TITLE VII'S COVERAGE PROVISION HAS NO PLAIN MEANING.

Title VII's coverage provision, which defines covered employers as those who "ha[ve]" fifteen or more employees "for each working day" during a limited part of the year, is poorly drafted, and has no one "plain meaning."[2] Because of the inherent ambiguity of the coverage provision, at least two plausible interpretations of what it means to "have" fifteen or more employees "for each working day" have emerged from the courts of appeals -- plausible, at least, if the provision is read with blinders, without reference to the context or the purpose of the statute. The rule adopted by the Seventh and Eighth Circuits distinguishes salaried workers from hourly or part-time workers, counting all salaried workers but counting hourly workers only when they are at work or on paid leave. The Seventh Circuit stated in the case below that "the most natural interpretation of [the phrase "for each working day"] looks to the number of employees physically at work on each day of the

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[2] Title VII defines a covered "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." § 701(b), 42 U.S.C. § 2000e(b). The "employees" referred to are defined as those "employed by an employer," § 701(f), 42 U.S.C. § 2000e(f); this is a standard definition derived from the common law and also used in other federal employment statutes. 29 U.S.C. § 1002(6) (ERISA); 29 U.S.C. § 203(e)(1) (FLSA); Rev. Rul. 87-41, 1987-1 C.B.296, 298-99 (various tax laws); *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318 (1992).

week."[3] Yet the court did not consider itself bound by the "natural" interpretation, since it also counted employees who were on paid leave. Rather, its decision implies a "daily payment" principle of counting hourly employees, under which the counted employees are defined by the fact of compensation. Under a daily payment principle, an employee is an "employee for each working day" only on days when she is at work or otherwise being paid. Although such a principle suggests that salaried employees should not be counted when they are on unpaid leave, the court below stated explicitly that its method "counts all salaried employees toward the minimum," presumably even on days when they are on unpaid leave.[4] Because the distinctions among employees created by the Seventh Circuit on the basis of compensation cannot be derived from the words of the statute, any assertion that the Seventh Circuit was applying a plain meaning rule is clearly incorrect.

The First and Fifth Circuits, on the other hand, have simply concluded that an employee is counted "for each working day" when he or she is on an employer's payroll for each working day in a given week.[5] This "payroll method" is based on the existence of an employment relationship and gives effect to the

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[3] *EEOC* v. *Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1228 (7th Cir. 1995); *Zimmerman* v. *North American Signal Co*, 704 F.2d 347 (7th Cir. 1983); *EEOC* v. *Garden & Associates, Ltd.*, 956 F.2d 842 (8th Cir. 1992) (adopting *Zimmerman* without further analysis).

[4] *Metropolitan*, 60 F.3d at 1227.

[5] *Thurber* v. *Jack Reilley's, Inc.*, 717 F.2d 633 (1st Cir. 1983); *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67 (1st Cir. 1995); *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980).

coverage provision's term "calendar weeks." A "calendar week," by itself, must mean seven days; the addition of "for each working day" may have been intended to ensure that enterprises that operate fewer than all of the days of the week will be covered if they have more than fifteen employees on the days that they operate. We cannot pretend that there is a wholly satisfactory explanation of why these words were chosen, but we submit that the use of the somewhat unusual *"calendar weeks"* supports determining coverage on the basis of weekly employment rather than by a separate examination of each day in each week.

Both the "daily compensation" and "payroll" methods give meaning to all of the words in the coverage provision, although with different emphasis. The daily compensation method focuses narrowly on "for each working day." The payroll method emphasizes what it means to "have an employee" and the reference to twenty "calendar weeks." The provision itself does not dictate which of those interpretations is correct. We suggest that the choice should be made by reference to Congress's objective that Title VII cover all employers except those whose small size would make enforcement unduly burdensome and time-consuming.

II. THE SEVENTH CIRCUIT'S METHOD OF COUNTING EMPLOYEES IS ARBITRARY AND UNWORKABLE.

When a statute has no plain meaning, its interpretation must be guided by the objectives of the statute, its legislative history, deference to the enforcing agency, and the practicalities of application. Despite the Seventh Circuit's acknowledgment

that "the statute could have been worded more clearly," the court claimed that the coverage provision had a "plain" meaning.[6] But the court created distinctions among salaried, hourly, and part-time workers that were not plain; they were not, in fact, supported by the statute, much less derived from any of the recognized guides to statutory interpretation. The Seventh Circuit's opinion imports these distinctions into a statutory text and context that in no way suggest them. As a result, litigation will certainly ensue over whether flextime workers and certain part-time workers are counted. Disputes are also certain to arise over the coverage of businesses that pay employees by sales commissions, a form of payment that accommodates and results in irregular working arrangements.

The Seventh Circuit's focus on the phrase "for each working day" not only fails to resolve substantial uncertainties about what constitutes a "working day", but, taken to its logical conclusion, undermines the application of the statute. When rigorously applied to employers who hold themselves out as "open seven days a week," the method forces courts to invent new concepts of "working day" to avoid absurd results. For instance, in *Wright* v. *Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327 (N.D. Ind. 1992), the defendant operated a clinic which was open Monday through Friday and half days on Saturday. Although the clinic was open each Saturday, providing the same services to its patients as it provided on weekdays, it was thinly staffed on that day, and would not have been covered by Title VII if Saturday counted as a "working day." The court reached the strained but sensible conclusion

[6] *Metropolitan*, 60 F.3d at 1228.

that Saturday was not a "working day," because the clinic did not conduct "normal, full operations" on that day, *id.* at 1333.

Wright shows that treating "working day" as the most important term in the coverage provision creates a dilemma. As the court observed, "a 200-employee factory, running three shifts from Monday through Saturday, could be placed beyond the reach of Title VII by sending a lone telephone operator to work on Sunday." *Id.* The same result would follow if a large business could not be conducted unless ten persons were at work every Sunday. Clearly, the coverage provision was not meant to exclude such businesses. But if the only way to avoid this result is to introduce the fact-specific concept of "normal, full operations" to give "working day" a meaning different from what that term is ordinarily thought to mean, it cannot be said that the provision is being given its plain meaning.

The Seventh Circuit's method, whether interpreted as requiring a "daily compensation" analysis or creating strict distinctions between salaried and hourly workers, imposes a crushing practical burden on employers and employees seeking to determine their coverage. Most small employers do not require employees to punch a time clock, nor do they prepare and retain two years' worth of daily attendance records. Yet the Seventh Circuit's focus on "for each working day" requires that they produce and maintain such records in order to know whether they are covered, and that they check these records routinely, since their coverage may vary while their payroll remains the same. Employers who fail to keep such painstaking records cannot know whether they are covered. In this way, the emphasis on "working day" ignores the value to small

businesses and their employees of certainty in application of the law.

Potential plaintiffs suffer even more than small businesses under the Seventh Circuit's method. An employer who fails to keep the pertinent records can deprive a plaintiff of the evidence needed to establish coverage. For instance, a restaurant may employ twenty-five people from Thursday through Sunday but have a staff close to fifteen on slower nights. If the restaurant owner does not keep meticulous records of which employees were present, salaried, or on paid leave on each day of the relevant two-year period, a plaintiff will not be able to prove that the restaurant is covered by Title VII even if the restaurant has the requisite number of employees. By giving a certain class of defendants the power to dictate whether a plaintiff can prove the jurisdictional minimum, the Seventh Circuit forecloses a class of suits in an arbitrary way that Congress could not have intended in drafting the jurisdictional provision.

Finally, the Seventh Circuit's method tends to exclude establishments employing those whom Title VII was meant to protect. A small business that hires mostly part-time workers is more likely to be excluded from coverage by this method. Part-time work, especially by minorities and women, has been routine since the passage of the Civil Rights Act of 1964. Bureau of Labor Statistics data from 1968-1987 show that the population of part-time workers has consistently contained

more women and minorities than the general population.[7] By disproportionately excluding businesses that hire many such workers, the Seventh Circuit method adversely affects the very class of people for whom Title VII was enacted.[8]

III. THE "PAYROLL METHOD" OF COUNTING EMPLOYEES IS A LEGITIMATE AND PRACTICAL INTERPRETATION OF THE COVERAGE PROVISION.

As the Seventh Circuit itself concedes, ambiguities in a remedial statute such as Title VII must be resolved in the plaintiff's favor.[9] The payroll method endorsed by the EEOC

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[7] U.S. Dept. of Commerce, Bureau of Labor Statistics, *Labor Force Statistics Derived From the Current Population Survey, 1948-87*, Tab. B-18, pp. 708-09 (Aug. 1988).

[8] Today, more than one in four people in the workforce work for a company with 20 or fewer employees. This percentage has remained constant between the years 1980 and 1992. U.S. Dept. of Commerce, Bureau of the Census, *County Business Patterns*, 1993, Fig. 1; U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1995*, No. 857 at 550. Forty-five percent of women who work outside the home are employed by businesses of 100 or fewer employees. Testimony of 9 to 5, The National Assn. of Working Women, et al., submitted to the Commission on the Future of Worker-Management Relations, Apr. 6, 1994 (Judith L. Lichtman, presenter), Fig. 6-4.

[9] *Zimmerman*, 704 F.2d at 353. *Cf. Irwin* v. *Department of Veterans Affairs*, 489 U.S. 89, 102 (1990) (Stevens, J., concurring in part and dissenting in part) ("Title VII, a remedial statute, should be construed in favor of those whom the legislation was designed to protect."). The holding as to which Justice Stevens dissented was superseded by the Civil Rights Act

(continued...)

and two courts of appeals is consistent with the text, resolves ambiguities appropriately, and is the only method that adequately considers the traditionally recognized guides to interpretation. The payroll method should be adopted by this Court as the most logical interpretation of Title VII's coverage provision.

The payroll method is based on the common-sense concept that, since an employer must "ha[ve]" fifteen employees, "the relevant employees [are]... all those who had an *ongoing employment relationship* with the employer during the requisite twenty weeks."[10] This method interprets "ha[ving] an employee for each working day" as having a contract of employment, whether written or oral, with the employee for each day during twenty weeks of the two years counted. The method relies on the best existing evidence of the existence of a contractual employment relationship: an employee's presence on the payroll. The method's results are logical: as one district court put it, an employee who was not physically present on a given day, but who had worked the day before and was expected to show up for work the following day, should be counted as an

[9] (...continued)
of 1991, which extended the time limit for filing a complaint to ninety days. Civil Rights Act of 1991, § 114(1) (codified as amended at 42 U.S.C. § 2000e-16). *See also Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972).

[10] *Vera-Lozano*, 50 F.3d at 69 (emphasis added).

employee on the given day.[11] And, because the method requires only an examination of payroll records, which must already be maintained for tax purposes, it is straightforward in application, imposes no additional burdens on employers, and requires no further definition of terms in the coverage provision.

As pointed out above, the payroll method views the "calendar week" requirement as an important part of the coverage provision and gives it greater effect than does the daily computation method. The superiority of the payroll method, however, lies in its practicality; it enables employers and employees to know easily and reliably whether the Act applies, and it eliminates the costly and wasteful discovery process for the thousands of employers that are close to the line. This is fully in accord with the congressional intention. In the course of the debate on the bill, Senator Cotton proposed an amendment that would have eliminated the coverage of Title VII for employers with less than 100 employees. In opposing the amendment, which was defeated, Senator Humphrey, the floor manager of the bill, noted that "[w]e have simplified the recordkeeping to the point where State records suffice, with whatever notations may be necessary to indicate employment." A few minutes later he added, "... what is more important than the coverage of the people is the manner in which those of us who worked upon the substitute package have sought to simplify the administration of the bill, the recordkeeping, the rights of employers, the rights of employees, the inclusion of

[11] *Wright* v. *Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ill. 1992). Whether the employee was paid for the day on which he was physically absent from work was not a factor in the court's analysis.

State and local authority, and the time factor involved ...." 110 Cong. Rec. 13,088 (June 9, 1964).[12]

All of these reasons support the conclusion that the payroll method was more than reasonably adopted by the EEOC. "[T]he EEOC's interpretation of ambiguous language [in a statute it is charged with enforcing] need only be reasonable to be entitled to deference." *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988); *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *cf.*, *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450 (1995) (agency interpretation of "employee" entitled to deference). Therefore its method should be adopted by this Court.

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[12] Senator Humphrey was undoubtedly referring to §§ 709(c) and (d), 42 U.S.C. §§ 2000e-8(c) and (d). Section 709(c) authorizes the EEOC to adopt regulations requiring employers to maintain such records as are reasonably necessary to carry out the purposes of the Act. Section 709(d) requires prior consultation with interested state and federal agencies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Nos. 95-259 & 95-779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DARLENE WALTERS and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,
v.
METROPOLITAN EDUCATIONAL ENTERPRISES, INC. and LEONARD D. BIEBER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

1. Since 1966, the Equal Employment Opportunity Commission ("EEOC") has read Title VII's definition of employer—a person that "has fifteen or more employees for each working day" for 20 or more weeks in a year—to cover any person that has 15 or more employees "*on the payroll and regularly employed*" during each working day over the prescribed period. The court below, however, read the operative words to require that an employer have 15 or more employees "*physically present at work or on paid leave*" during each working day over the prescribed period. All applicable canons of statutory construction support the Agency's view.

2.a. By its terms, Title VII's employer definition applies to a person that "*has* fifteen or more employees for each working day" for 20 weeks in a year. The ordinary meaning of these words, established by the law of employment relations, is that a person "has" another as an employee continuously between hire and discharge or quit, and not (as the court below would have it) only when the employee is physically present or on paid leave. Not surprisingly then, the lower court's view also leads to anomalies, *e.g.*, not covering all employers with 15 employees who work full-time hours in fewer than all work days in a work week while covering all employers with 15 part-time employees who are scheduled each work day.

b. The lower court's concern that the EEOC's reading of the employer definition would render superfluous the statutory words "for each working day" is unfounded. The Agency's interpretation provides a bright-line rule under which an employee is not counted toward the employer's total unless she is on the payroll for the *entire* work week. The establishment of a bright-line rule of coverage was an important part of Congress' purpose for the employer definition.

c. In three regards, the legislative history of Title VII fully supports the EEOC's reading of the employer definition and nothing in the legislative materials supports the court of appeals' posit:

> The employer definition is intended to provide a clear rule of coverage that does not sweep in employers who had more employees than prescribed in the statute for only the smaller part of the *year* (*i.e.*, employers of seasonal work forces). There is no suggestion of a legislative intent to draw finer lines based on an employee's physical presence in the work place for all days or fewer than all days of a work week.

Title VII's employer definition was derived from that of the Unemployment Compensation Act. In 1964, in defining "employer" under the latter Act, the Internal Revenue Service long had considered an employee employed on all days on which she was on the employer's payroll.

Finally, the small business exemption arose out of Congress' solicitude for the intimate, personal ties binding employer and employee in businesses with a small work force. The EEOC's reading of the employer definition respects the point of the small business exemption without unduly undermining Title VII's broad purpose of eliminating employment discrimination: the lower court's reading does not further the former and undermines the latter.

d. This is, moreover, one of the rare cases in which an action of a later Congress throws a "cross light" on the action of an earlier Congress, *see Pipefitters v. United States*, 407 U.S. 355, 412 (1972). The 1993 Congress, in enacting the Family and Medical Leave Act ("FMLA"), modeled its employer definition on Title VII's. And, the 1993 Congress stated in the legislative history that the FMLA employer definition should be interpreted as the EEOC and the majority of courts had interpreted Title VII's employer definition to count to-

wards an employer's total all employees on the payroll. This post-enactment history, in combination with Title VII's own legislative history, confirms the correctness of the EEOC's reading of Title VII's employer definition.

ARGUMENT

1. Title VII of the Civil Rights Act of 1964 defines an employer as a person that "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b).

The Equal Employment Opportunity Commission ("EEOC"), the Agency charged with administering and enforcing Title VII, in its turn, has determined that "[t]he term 'employees for each working day' . . . refers to persons on the payroll and regularly employed, not the number of persons at work on any given day." *First Annual Digest of Legal Interpretations of Title VII of the Civil Rights Act of 1964* 2 (1966) (citing General Counsel Opinion dated May 11, 1966).[1]

The court below disagreed, holding that only a person that has fifteen or more employees "*physically present at work or on paid leave* for each working day of twenty weeks in a year" is a Title VII "employer." *See EEOC v. Metropolitan Education Enterprises, Inc.*, 60 F.3d 1225, 1227 (7th Cir. 1995) (emphasis supplied). Metropolitan Education Enterprises did not, and the court below accordingly dismissed this case for lack of subject matter jurisdiction.

Every relevant statutory interpretation factor points to the conclusion that the EEOC's reading of Title VII could not be more right and the Seventh Circuit's could not be more wrong.

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[1] *See also* EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311-N:3316 (Apr. 20, 1990) (reprinted in Pet. App. 30a-40a).

2.a. We begin the analysis by returning to the exact words of Title VII's "employer" definition—any person that "*has* fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Section 2000e(b) (emphasis supplied).

The EEOC reads the critical words—a person that "has . . . [an] employee[]"—to mean a person that hires another person as an employee to work on a regular basis where there has not been a discharge or a quit. On this reading, the term "has" is understood to refer to a continuous relationship that begins with an agreement to do work as an employee and ends with a termination of that agreement; so long as that relationship continues, the first person "has" the second person as an employee on each and every intervening day.

The Seventh Circuit reads the operative statutory words to mean a person that suffers another person to do work as an employee on a particular day or to take paid leave on that day. On this reading, the term "has" is understood to refer to a series of separate, discrete transactions, each consisting of a day on which one person agrees that another person is to do work as an employee or is to be paid as if she did such work—and each severable from non-work days during which the former does *not* have the latter as an employee.

"Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'" *Pioneer Investment Services Corp. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The established set of understandings that determine when a person "has" an employee is provided by the law of employment relations. That law supports the EEOC's determination that regular employment relationships exist continuously between hire and discharge or quit and negates the Seventh Circuit's notion that, between a hire and a

discharge, regular employment relationships exist only in fits and starts.

Most obviously, an employee under contract for a term is deemed to remain in an employment relationship for that term, absent resignation, death, disability, or discharge under the contract. *See, e.g., Eisenberg v. Insurance Co. of North Amer.*, 815 F.2d 1285 (9th Cir. 1987); *see also* Restatement Second Agency §§ 117, 118.[2] The law does not treat the relationship of employment for a term as one which terminates at the end of each employee work day and recommences with her next work day.

The same is true of the relationship of employment at will, in which the employee works only as long as the employer and employee please. The established employment law in this regard was recently set out in an opinion of the Seventh Circuit (overlooked by the panel below) where Judge Posner explained: "Employment at will is not a state of nature but a *continuing contractual relation.*" *McKnight v. General Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990) (emphasis supplied), *cert. denied*, 499 U.S. 919 (1991). "A contract for employment at will may end abruptly but it is a real and continuing contract nonetheless, not a series of contracts each a day—or a minute—long." *Id.*

In common parlance, then, whether a person is employed for a term or at-will, the employer "has" that person as an employee so long as a regular employment relationship continues, both on days that the employee is physically present at work and on days that the employee is absent.

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[2] Indeed, when such an employee continues to work after his or her contract expires, it is *presumed* that the contract (*i.e.*, the employment relationship) has been renewed. *See, e.g., Consolidated Bearings Co. v. Ehret-Krohm Corp.*, 913 F.2d 1224 (7th Cir. 1990); *Vogel v. WMATA*, 533 F.2d 13 (D.C. Cir. 1976).

This point is reinforced by the anomalies created by the lower court's peculiar version of the employment relationship. Under that view, *all* members of the class of persons who do business the traditional 5 days a week and who employ 15 or more employees, each of whom works the traditional 5-days-a-week-8-hours-a-day schedule, *are* Title VII "employers." But *only some* members of the following classes of persons employing 15 or more employees, each working on a 40 hour a week basis, are Title VII employers: Persons employing more than 15 full-time employees who work fluctuating compressed work weeks (*e.g.*, four 10-hour days) and persons doing business seven days a week (instead of the traditional five) employing more than 15 full-time employees who work fluctuating 5-day work weeks. In both instances, while the employer gets the benefit of a traditional 15 full-time employee complement, on any given working day less than 15 employees may be present or on paid leave.

By the same token, on the Seventh Circuit's view, *all* persons employing 15 or more part-time employees who work 20 hours a week throughout the employer's five-working-days week would be covered by Title VII, while *only some* persons employing 15 or more part-time employees who work 20 hours a week on a fluctuating schedule would be covered.

In contrast, the EEOC's reading of Title VII's "employer" definition—which rests on the ordinary legal understanding of the employment relation—properly treats all employers with the same number of regular employees on the payroll as the same for Title VII coverage purposes.

b. The court below refused to defer to the EEOC's interpretation of the text of section 2000e(b), in part because that court believed that it "would render the words 'for each working day' superfluous." 60 F.3d at 1227. But that is not so.

Under the EEOC's reading of section 2000e(b), an employer "has" an employee for a working day only if she is on the payroll that day. The result is that an employee who is hired on Tuesday is not on Monday's payroll and is not counted for the week in question; by the same token, an employee who is discharged on Thursday is not on Friday's payroll and is not counted for the week in question.

On the EEOC's reading, then, Title VII's "employer" definition differs significantly from, for example, a provision counting an employee towards the employer's total if she works on "most" working days in a week. The former establishes a particular bright-line rule for determining coverage while the latter does not. And, as we show below, enactment of a bright-line rule of coverage was of critical importance to Congress in 1964.

For all these reasons, the EEOC's reading of the phrase "for each working day" is more than reasonable and therefore is entitled to a deference that it did not receive from the lower court. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).[3]

c. The legislative history of Title VII buttresses the EEOC's interpretation of section 2000e(b) and undermines that of the lower court.

The House bill, H.R. 7152, defined the term "employer" as a "person engaged in an industry affecting commerce who has 25 or more employees." That bill was taken directly to the floor of the Senate where an 83-day debate ensued. The legislative stalemate was eventually broken by a Senate bipartisan leadership compromise bill making substantial changes in H.R. 7152, including changes to the definition of "employer." The

[3] "[I]t is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *Id.*

compromise was embodied in Senate substitute amendment No. 656—the Dirksen-Mansfield amendment—and with few changes, none relevant here, that substitute amendment became Title VII as enacted into law.

During the course of the Senate debate, two issues related to the definition of "employer" were aired. The first concerned the number of employees that would be required to trigger Title VII coverage. The Senate proponents of the House bill—without deviating from their belief that employment discrimination by smaller employers is morally wrong and harmful to the economy[4]—defended the provision exempting employers with fewer than 25 employees on the pragmatic ground that "when [businesses] get above 25, they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services. They also lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13088. In contrast, the House bill's opponents sought to press the exemption's logic further:

> [I]n a small business which employes (sic) 30 or 40 persons, the personal relationship is predominant. . . . [W]hen a small businesman who employs 30 or 25 or 26 persons selects an employee, he comes very close to selecting a partner; and when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife. [*Id.* at 13085 (Sen. Cotton).]

[4] *See, e.g.*, 110 Cong. Rec. 13090 ("such discrimination is wrong[.] [T]here is no division of opinion among us on that point") (Sen. Case); *id.* at 13091 ("[e]very bit of evidence we have in connection with fair employment practice laws indicates that such statutes not only are good law, good morals, and good labor-management practice, but also good economics") (Sen. Humphrey); *id.* at 13088 ("[t]here is considerable evidence to demonstrate that permitting people to be hired on the basis of their qualifications not only helps business, but also improves the total national economy") (Sen. Humphrey).

In the event, the 1964 Civil Rights bill set the exemption number at 25 employees; and, in 1972, Congress amended the definition of employer in Title VII to lower the statutory threshold for coverage to employers of 15 or more employees to further its principal goal of combating employment discrimination.[5]

The second employer definition issue concerned the situation of an employer with a seasonal work force that fluctuates above and below the numerical threshold set by the statute over the year. Senator Dirksen, the Republican minority leader whose support was essential to break the filibuster led by the Southern Democrats, raised this issue in a memorandum he submitted to the Senate proponents of the House bill and introduced into the Congressional Record. Relevant here, Senator Dirksen made the following inquiry:

[5] *See, e.g.*, S. Rep. No. 92-415, 1st Sess. 8 (Oct. 28, 1971) (stating, in explaining decision to expand coverage, that "[t]he Committee agrees with the Chairman of the EEOC that discrimination should be attacked wherever it exists, and recognizes that small establishments have frequently been the most flagrant violators of equal employment opportunity"); H. Rep. No. 92-238, 1st Sess. 20 (June 2, 1971) ("[t]he committee feels that discrimination in employment is contrary to the national policy and equally invidious whether practiced by small or large employers"). While Congress retained a limited small business exemption out of a continued "concern[] with the impact of additional federal regulations on smaller businessmen," 118 Cong. Rec. 4907 (Sen. Williams, Chief Sponsor of Title VII Amendments in the Senate), the expanded coverage of Title VII—and the correlative shrinkage in the small business exemption—reflects increased emphasis on Title VII's broad purpose of eliminating employment discrimination and decreased emphasis on the countervailing free association rights of small businesses, *see also id.* at 3972 (Sen. Williams) ("the bill broadens its coverage to reach the employers of 15 or more and unions with 15 or more members. I will say that it is a great advance. Ideally, I think, it should apply to all, but we have made that decision, and for only practical reasons have we made it employers of 15 or more and unions with 15 or more members. A man or woman who has been discriminated against has been wronged just as much whether he or she is an employee in a little shop with three or four or one with fifteen or more").

> [A]ssume if you will the operation of a medium-size orchard. For 11 1/2 months of the year the employer has no employees. But during 2 weeks of the year he employs 100 pickers. Is he to be subjected to the provisions of this title? What of summer or winter resort operations where employment is only for 2 or 3 months at the most. Are they to be covered by this title? Certainly we have no clear statement by which an employer can be guided. Is this the way to legislate? [110 Cong. Rec. 7216-17.]

Senator Clark responded that under the bill as then drafted, "[e]mployers whose staffs fluctuate seasonally are covered by the act at times when the number of employees exceeds the minimum figure; they are not covered when it is below the minimum." *Id.* at 7217.

Not surprisingly, the Dirksen-Mansfield substitute amendment responded to Senator Dirksen's concern by adding to the definition of "employer" the language at issue here—"for each working day in each of twenty or more calendar weeks in the curent or preceding calendar year." The office of that language was to preclude Senator Clark's approach whereby employers would move in and out of coverage on a weekly basis and to do so by providing the "clear statement" on coverage that Senator Dirksen sought. Senator Humphrey explained:

> [The amendment] provide[s] needed certainty as to coverage of employers where the number of employees fluctuates above and below the figure requisite to application of the title. Coverage is limited to those employers who employ more than the required minimum number of employees for at least 20 weeks out of the year. [110 Cong. 12722 (Sen. Humphrey).]

And, Senator Dirksen added:

> [W]e undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect that the definition of the

> term "employer" would apply to 25 or more who were employees for each working day, in each of twenty or more calendar weeks. [110 Cong. Rec. 13087.][6]

The foregoing teaches three pertinent lessons:

First, the point of the employer definition is to provide a clear rule of coverage, and one that does not sweep into coverage employers who employ more than the statutory number of employees for only the *smaller part of a year*. It was no part of Congress' purpose to draw fine lines based on whether a regular employee is physically present in the workplace each and every day of a particular work week or three days of that week. The congressional materials thus reinforce the canon of construction that calls for reading Title VII's employer definition according to the law's ordinary understanding of the employment relationship.

Second, as Senator Dirksen stated, the "employer" definition of Title VII was derived from the Unemployment Compensation Act. While the path from the unemployment law to Title VII is in many ways a meandering one, at least one link is plain and direct—in 1964, and during the nine years preceding, the Internal Revenue Service, in defining the term "employer" in the Unemployment Insurance Act, considered an employee to be employed on all days of any week that she was on the employer's payroll. Thus, employees who worked full-time hours on fewer than all working days in a week were counted, *see* Revenue Ruling 55-38 (stating that employees who "because of the long daily hours of employment . . . are granted 1 or 2 days of absence each week" are to be counted; "[i]f the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain

[6] *See also* 110 Cong. Rec. 13088 (Sen. Dirksen) (in defining employer, we "put a sensible figure on the bill, and then nailed it down to make a proper exception for seasonal employees").

days of the week"). Also counted were employees who worked part-time hours during fewer than all days of the week, *id.* (stating that "housewives [who] work half days 3 days per week" are to be counted; "[a]n employee who has worked for an employer only 3 days in each week for a number of years is considered to be 'in employment' on the remaining days of the week").

The legislative reference to the Unemployment Compensation Act thus strongly supports the EEOC's reading of section 2000e(b).

Third, and finally, the legislative materials show that Title VII's small business exemption was in large part the product of a congressional solicitude for the intimate, personal ties that bind an employer and its employees in a small business. Congress defined that threshold in terms of the number of employees on the judgment that, as the size of the workforce increases, the potential for, and likelihood of, such intimacy—and hence the corresponding justification for an exemption from Title VII—decreases.

The EEOC's reading of section 2000e(b) respects the point of the small business exemption without unduly undermining the policy interest represented in Title VII's antidiscrimination provisions. Employer-employee intimacy is, in general, a function of the total number of employees working in an enterprise, and not a function of how many employees are physically present on a working day. Indeed, the policy concerns underlying the small business exemption are far less likely to be implicated in the case of an employer with a substantial number of part-time employees. As a general matter, the relationship between an employer and part-time employees is more tenuous and less intimate than its relationship with core employees.

A large reason why employers hire part-time employees—rather than full-time employees—is to *avoid* the commitments associated with the full-time employ-

ment relationship and to secure employee services at a lower cost (lower pay and fewer fringe benefits such as health insurance and pension benefits) than those entailed in hiring a core, full-time worker. Precisely because the employer makes a lesser investment in and commitment to a part-time employee, the intimacy of the association is correspondingly less. *See, e.g.*, duRivage, Virginia L., ed. *New Policies for the Part-Time and Contingent Workforce*, Economic Policy Institute Series 7-8, 10, 21-24, 73, 91-94 (1992).

In sum, Title VII's protective purpose—to eliminate employment discrimination—is compromised by not counting both regular full-time employees and regular part-time employees who work fewer than all working days in a week in determining whether the statutory threshold for employer coverage under Title VII is satisfied. Equally to the point, neither the broad purpose of Title VII nor the limited, countervailing purpose of the small business exemption—to protect legitimate free association interests of small operators—is served by the lower court's reading of the "employer" definition.

c. The foregoing is, we believe, dispositive. But there is an additional weight in the scale on the side of the EEOC's interpretation of section 2000e(b). In narrow circumstances, the Court considers the actions of a later Congress to " 'throw a cross light' " on a legislative act of a previous Congress. *See Pipefitters v. United States*, 407 U.S. 385, 412 (1972).

In *Pipefitters*, the issue was the meaning of the 1947 enactment of section 610 of the Federal Election Campaign Act. In construing that enactment, the Court took into account the 1971 amendment to that provision passed "to codify the court decisions interpreting [and the legislative history explicating] section 610." 407 U.S. at 410. In so doing, the Court stated:

> The consensus that has now been captured in express terms in § 610 cannot, of course, by itself conclusively establish what Congress had in mind in 1947. But it does "throw a cross light" on the earlier enactment that, together with the latter's legislative history, demonstrates beyond doubt the correctness of the parties' common ground interpretation of § 610. [*Id.* at 411-12 (quoting *Michigan Nat. Bank v. Michigan*, 365 U.S. 467, 481 (1961) (quoting L. Hand, J.)).]

Similarly here, Congress recently enacted a statute, the Family and Medical Leave Act ("FMLA"), that tracks Title VII's definition of employer (except that an employer is required to "employ" 50 instead of 15 employees "for each working day" to trigger coverage). The legislative history of the FMLA indicates that Congress intended the provision defining employer to have the meaning that the EEOC and a majority of courts have already given to it in the Title VII context. The Senate Report stated that the FMLA's "employer" definition

> parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted the language, "employs . . . employees for each working day" is intended to mean "employ" in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose." [S. Rep. No. 103-3, 1st Sess. 21-22 (1993).]

The "cross light" that the legislative history of the FMLA sheds on section 2000e(b), "together with the latter's legislative history, demonstrates beyond doubt the correctness" of the EEOC's reading of that provision. *Cf.*, *Pipefitters*, 407 U.S. at 411-12.

CONCLUSION

For the above stated reasons as well as those stated in the Brief for the Equal Employment Opportunity Commission, the decision below should be reversed.

Respectfully submitted,

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Nos. 95-259 and 95-779

In the Supreme Court of the United States

OCTOBER TERM, 1995

DARLENE WALTERS,
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v.
METROPOLITAN EDUCATIONAL ENTERPRISES, INC., and LEONARD BIEBER,
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BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND; AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION-WOMEN'S RIGHTS PROJECT; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; AMERICAN NURSES ASSOCIATION; CALIFORNIA WOMEN'S LAW CENTER; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.; EQUAL RIGHTS ADVOCATES, INC.;

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are women's rights, civil rights, civil liberties, religious, and labor organizations that work to eliminate all forms of discrimination in the workplace.[2] The case before this Court is of great interest to *amici* because the outcome will carry important implications for the civil rights protections available to significant numbers of workers. More specifically, this case will decide the extent to which hourly and part-time workers on an employer's payroll will be counted when determining whether that employer has the requisite number of employees to trigger statutory coverage—and thus whether its workers are protected by federal antidiscrimination law.

SUMMARY OF ARGUMENT

The courts below are split over the extent to which hourly and part-time workers should be counted when determining whether an employer has the requisite number of employees to trigger title VII coverage. The "payroll" method counts all workers who are on the employer's payroll for each day of the week, regardless of whether they are physically present at work each day of the week. The "day-by-day" approach counts hourly and part-time workers as employees only when they are actually present at work or on paid leave for each working day of the week.

No sound public policy rationale supports the use of the day-by-day approach over the payroll method. Not only is the day-by-day approach completely without basis in either the text or legislative history of title VII, it ignores the realities of common workplace practice and thus generates results that are both absurd and inconsistent with title VII's purposes. Moreover, the day-by-day approach arbitrarily limits title VII coverage of significant numbers of employers who employ workers most in need of protection against invidious discrimination.

In contrast, use of the payroll method avoids the absurd and unfair consequences generated by the day-by-day approach. It also ensures consistent interpretation of parallel language in the Family and Medical Leave Act. Finally, unlike the day-by-day approach, the payroll method is simple to apply and does not unreasonably burden parties seeking to enforce title VII's guarantees of equal employment opportunity.

ARGUMENT

NO SOUND PUBLIC POLICY RATIONALE SUPPORTS THE ADOPTION OF THE "DAY-BY-DAY" APPROACH OVER THE "PAYROLL" APPROACH WHEN DETERMINING WHETHER AN EMPLOYER IS COVERED BY FEDERAL ANTIDISCRIMINATION LAW.

Title VII of the Civil Rights Act of 1964—which prohibits job discrimination on the basis of race, sex, color, religion, and national origin—applies to any employer "engaged in an industry affecting commerce who has fifteen or more employees *for each working day* in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b) (1994) (emphasis added). The question before the Court is whether title VII applies to an employer who maintains fifteen or more employees on its payroll for every working day for the requisite number of weeks even if fewer than fifteen employees are physically present at work or on paid leave for each day of each week.[3]

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[1] Petitioners and Respondent have consented to the filing of this brief and the parties' letters of consent have been filed with the clerk of this Court.

[2] Individual statements of interest of the *amici* are attached as the Appendix to this brief.

[3] This case will also likely determine the test to be applied when determining coverage under the Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (1994), and the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A) (1994), which borrow title VII's definition of "employer" almost word for word.

The lower courts have developed two different approaches for determining whether an employer has the requisite number of employees for title VII purposes. The First and Fifth Circuits have endorsed the "payroll" method, which counts all workers who are on the employer's payroll for each day of the week—regardless of whether they are physically present at work each day. *Vera-Lozano v. International Broadcasting*, 50 F.3d 67, 69-70 (1st Cir. 1995); *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984); *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980). Workers who are added to or dropped from the payroll midweek are not counted under the payroll method for the days that they are not on the payroll.

In contrast, the Seventh and Eighth Circuits have adopted the "day-by-day" approach, which counts hourly and part-time [4] workers as employees only when they are

[4] It remains unclear whether the rule announced in the courts below is intended to apply to part-time salaried workers as well as to full- and part-time hourly workers. For example, the Seventh Circuit stated in its opinion below that the day-by-day method "counts all salaried employees toward the minimum, but takes a different approach towards hourly *or* part-time workers. Such workers are considered employees only on days when they are physically present at work or on paid leave." 60 F.3d at 1227 (emphasis added). This formulation does not offer clear guidance about how to treat part-time *salaried* workers.

However, the *Zimmerman* decision that the Seventh Circuit purported to reaffirm in this case more clearly focused on the distinction between all salaried and hourly workers (regardless of full- or part-time status) by holding only that the day-by-day method excludes "*hourly-paid* workers as employees for days when they were neither working nor on paid leave." *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 354 (7th Cir. 1983) (emphasis added).

On the other hand, in *EEOC v. Garden and Assocs., Ltd.*, the Eighth Circuit mentioned only part-time workers without regard to hourly or salaried status when it held that "part-time employees who are neither working nor on paid leave during each day of the work week" are not counted towards a company's total number of

actually physically present at work or on paid leave for each working day of the week. *EEOC v. Metropolitan Educ. Enters., Inc. ("Walters")*, 60 F.3d 1225 (7th Cir. 1995); *EEOC v. Garden and Assocs., Ltd.*, 956 F.2d 842 (8th Cir. 1992) (interpreting the ADEA's definition of employer); *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 353-54 (7th Cir. 1983) (ADEA); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983). Under this test, salaried workers are apparently considered employees for the entire workweek regardless of their physical presence at work or their leave status. *Walters*, 60 F.3d at 1227.

In this brief, *amici* explore the two methods' very different policy consequences, demonstrating how the day-by-day method generates absurd results that undercut title VII's dual purposes of remedying and deterring job discrimination.[5] Indeed, *amici* contend that there is absolutely *no* sound public policy rationale for adopting the day-by-day approach over the payroll method.

employees under the ADEA. 956 F.2d at 843. *See also McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983) (rejecting assertion that part-time workers who did not work each day of the workweek should be considered employees for the entire week).

Thus the various lower court opinions adopting the day-by-day approach are unclear about whether part-time salaried workers are considered employees for those weeks in which they are not physically present at work or on paid leave for each working day. Of course, *amici* urge this Court to reject the day-by-day approach in any event.

[5] The Petitioners' briefs explain, *inter alia*, why both the text and legislative history of title VII support the use of the payroll approach.

A. The Day-by-Day Approach Generates Results That Are Both Absurd and Inconsistent With the Purposes of Title VII Because It Ignores the Realities of Common Workplace Practice.

The court below held that hourly and part-time workers are to be considered employees for purposes of determining an employer's title VII coverage only when they are physically present at the workplace or on paid leave for each day of the workweek. Not only is such a limitation completely without basis in either the text or legislative history of title VII, it ignores the realities of common workplace practice and thus undermines fair and effective statutory enforcement. As a result, the day-by-day approach generates a range of absurd results that require its rejection as an erroneous interpretation of title VII.

First, the day-by-day method excludes part-time hourly workers who do not report to work every day—while including part-time hourly workers who work the same or fewer hours by reporting every day of the week for part of the day. Thus, under the day-by-day approach, a worker who works eight hours a day for four days a week (a total of 32 hours) would not be considered in determining whether her employer is covered by title VII; on the other hand, her colleague working four hours a day for five days a week (a total of 20 hours) *would* be counted. Such a distinction is completely arbitrary and irrational and, in fact, fails to produce an accurate determination of the size of an employer's workforce.[6]

Similarly, the day-by-day approach also excludes full-time hourly workers who work on what are known as "compressed workweeks" by working fewer days each week, but for longer hours each day. For example, under

[6] Not only does the day-by-day approach create a series of arbitrary and unfair results, it encourages employers to manipulate their hiring and scheduling practices to escape the nondiscrimination requirements imposed on employers of equal or lesser size.

the day-by-day approach, a full-time worker working a compressed workweek of ten hours a day, four days a week would not be counted; however, her collegue working the same number of hours each week spread over five days *would* be included in the count. Again, this distinction is completely nonsensical and carries significant practical consequences: the Bureau of Labor Statistics, for example, reports that 43 percent of establishments surveyed provide compressed workweeks and other forms of flexible scheduling as an option for their workers[7]; more than 12 million full-time workers—15% of the full-time workforce—work on flexible schedules.[8]

The day-by-day approach's unreasonably rigid reading of the phrase "for each working day" generates other arbitrary outcomes as well. For example, the day-by-day method could be read to exclude from consideration the worker who works only five days a week for a restaurant employer open for business seven days a week.

The day-by-day approach generates yet another set of absurd results because of its unwarranted distinction between hourly workers on paid and unpaid leave. Hourly workers on paid vacation would be counted under the day-by-day approach, while hourly workers who are on unpaid leave—such as unpaid bereavement leave, unpaid leave for jury duty, or unpaid family or medical leave to respond to a family or medical emergency—would not.[9]

[7] Employee Benefit Research Institute, *The Changing Environment of Work and Family*, tbl. 8 (June 1993), citing U.S. Dept. of Labor, Bureau of Labor Statistics, *BLS Reports on Employer Child-Care Practices*, news release USDL 88-7 (Jan. 7, 1988).

[8] Bureau of Labor Statistics, Dep't of Labor, *Workers on Flexible and Shift Schedules* 1 (Aug. 14, 1992).

[9] In fact, more hourly employees than salaried workers take leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.* (1993). More specifically, hourly employees make up 55% of those who take leave under the FMLA. Because much of

Furthermore, strict application of the day-by-day method would even exclude workers on other sorts of work schedules such as those where the hourly worker performs some paid work from home and is not actually "physically present" at work for some part of the workweek. Again, a significant number of American workers engage in such work patterns: in 1991, 1.9 million non-self-employed workers worked at home for pay for some part of the week.[10] Under the day-by-day approach, hourly workers who telecommuted or otherwise performed one day's work at home in a week would likely be excluded when determining whether their employer was covered by title VII.

Although the sorts of work schedules described above have become increasingly prevalent in recent years,[11] these various work arrangements were by no means unknown at the time of title VII's enactment. Indeed, the available evidence suggests that Congress was aware of such work arrangements and intended that workers engaged in them

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that leave is unpaid—nearly 43% of hourly workers receive no pay at all during their FMLA leave, while another 25% are paid for only a portion of their leave—many of those workers would not be considered employees under the day-by-day apprach for any week during which they took one or more days of FMLA leave. *See* Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 266, 282 (1996).

[10] William G. Deming, *Work at Home: Data from the CPS*, Monthly Lab. Rev., Feb. 1994, tbl. 1.

[11] For example, the number of employers offering flexible scheduling increased from 51% in 1990 to 73% in 1995; similarly, the number of employers offering work-at-home options nearly doubled from eight percent in 1990 to 15% in 1995. *Nearly All Firms in Five-Year Survey Report Now Offering Dependent Care*, National Rep. on Work and Family (BNA), Mar. 15, 1996, at 45-46, citing Hewitt Associates, *Salaried Employee Benefits Provided by Major U.S. Employers in 1990 and 1995: A Comparison Study* (1996).

would be counted as employees when determining an employer's title VII coverage.

As the First Circuit emphasized, during congressional consideration of the Civil Rights Act in 1964 Senator Dirksen stated that title VII's definition of "employer" was modelled on that contained in the Unemployment Compensation Act (UCA), 26 U.S.C. § 3304 (1954). *Thurber*, 717 F.2d at 634, citing 110 Cong. Rec. 13,087 (1964). The Internal Revenue Service (IRS), in turn, had issued a 1955 ruling interpreting the UCA's definition of employer that explicitly recognized the existence of arrangements equivalent to compressed workweeks and part-time schedules:

> Question 1. Are employees considered to be in the employ of an employer during the entire week where, because of the long daily hours of employment, the employees are granted 1 or 2 days of absence each week and substitutes replace the absent regular employees?
>
> Answer. The regular employees should be considered to be in the employ of the employer during the entire week. The basis of this conclusion is that the employer-employee relationship which exists between the parties does not terminate by reason of their absence from duty for 1 or 2 days during the week. If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week.
>
> * * * *
>
> Question 6. Where an employer could not get full-time employment in his area he had to permit housewives to work half days 3 days per week. Because of this situation, he pays part-time salaries to 12 people each week even though there are never more than 3 employees in his shop at any one time, nor more than 6 on any one day. What number of employees should be recorded for each week in this situation?

> Answer. If the employees are engaged with the understanding that they will perform services for the employer each week, the employer would have 12 individuals in his employ on each day of the week until the employer-employee relationship is terminated.

Rev. Rul. 55-19, 1955-1 C.B. 497, 498-99. Thus the IRS interpreted the UCA to require the inclusion of employees involved in these sorts of work arrangements when determining an employer's coverage under that Act.

If Congress modelled its definition on that of the UCA, it is reasonable to assume that it was aware of agency interpretation of the UCA and intended a similar interpretation for title VII's definition of "employer." *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 509, 536 (1982); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). It is thus fair to conclude that Congress intended workers participating in work arrangements addressed by the IRS ruling to be included under title VII's definition of "employer" as well.

In short, the day-by-day method would have generated unreasonable results in light of workplace practice 30 years ago just as it does today. It should thus be rejected as an erroneous interpretation of title VII. *See, e.g., EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120-21 (1988) (Court "need not and should not countenance" respondent's interpretation of title VII that generates absurd results contrary to statutory purposes).

B. The Day-by-Day Method Arbitrarily Limits Title VII's Coverage of Employers Who Employ Workers Most in Need of Protection Against Invidious Discrimination.

Not only does the day-by-day method generate absurd results, it significantly limits the reach of antidiscrimination protections by arbitrarily excluding many hourly and part-time workers when determining employer coverage. By unfairly and unnecessarily limiting statutory coverage

of employers who employ these workers, the day-by-day approach undermines title VII's purposes of remedying and deterring discrimination.

Indeed, use of the day-by-day method limits protections against job discrimination for large numbers of workers. Nearly 800,000 employers—employing more than 10 million workers—report, like the Respondent, a payroll size of between 10 and 19 workers. Bureau of the Census, Dep't of Comm., *County Business Patterns 1993*, tbl. 1b (1995).[12] Moreover, more than half of all American workers are employed on an hourly basis, Bureau of Labor Statistics, Dep't of Labor, Annual Average Current Population Survey Data (1995) (unpublished), and almost 24 million workers—nearly one in five—are employed part-time. Bureau of Labor Statistics, Dep't of Labor, *Contingent and Alternative Employment Arrangements* tbls. 1, 2 (Aug. 1995). Because hundreds of thousands of employers are at or around title VII's coverage threshold—and because a significant number of their employees are likely to be hourly and/or part-time workers—use of the day-by-day method threatens arbitrarily to remove large numbers of these employers and their workers from federal antidiscrimination guarantees.[13]

In addition, use of the day-by-day approach means that hourly workers may unintentionally but unavoidably compromise their protections under federal antidiscrimination

---

[12] Thus twelve percent of all employers fall within just a few workers of title VII's jurisdictional minimum; 11 percent of all workers work for employers in this range. *County Business Patterns 1993* at fig. 1.

[13] Similarly, another half a million employers employing an additional 15 million workers (eight percent of all employers and 16 percent of all workers) list payrolls of between 20 to 49 workers. *Id.* Using the day-by-day method to exclude part-time and hourly workers would remove many of these employers and their workers from the protections of title VII and the ADA (covering employers of 15 or more), as well as the ADEA (covering employers of 20 or more).

law when they assert their rights to family and medical leave. Hourly workers who use unpaid leave designed to enable them to care for their family members or for their own serious health conditions may find that their leave-taking removes their employer from the reach of federal antidiscrimination law.

For example, an hourly worker on unpaid medical leave for cancer, HIV, or another disability would not be counted under the day-by-day method. Her leavetaking thus increases the likelihood that her employer would not be covered by the ADA at a time when she might most need its protections. Similarly, an hourly worker who has taken unpaid family and medical leave for pregnancy and childbirth would not be counted under the day-by-day approach, again reducing the chance that her employer is covered by title VII at a time when she may most need it.[14] Moreover, workers who take advantage of flexible work arrangements—e.g., workers who work part of the week at home or who use compressed workweeks—to accommodate their family caregiving responsibilities may well find themselves in the same situation.

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[14] Hourly workers are no less likely to be victims of discrimination than are full-time salaried workers. In fact, discrimination victims are *more* likely to be hourly workers simply because there are more hourly than salaried workers in the American economy. *See* Bureau of Labor Statistics, Dep't of Labor, Annual Average Current Population Survey Data (1995) (unpublished). And surely the pain and humiliation of discrimination are no less keenly felt by hourly workers than by their salaried counterparts. Indeed, hourly workers—who have on average significantly lower incomes than salaried workers—are likely to experience even greater suffering than salaried workers when discrimination causes job loss and other adverse economic effects. Furthermore, by irrationally distinguishing between salaried and hourly workers, the day-by-day method disproportionately and unfairly excludes women and people of color, who make up the majority of hourly and part-time workers. *See id.*

Because title VII should be construed liberally in light of its remedial purposes, *Quijano v. University Fed. Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977) (title VII should be liberally construed when determining employer coverage); *see also Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (remedial civil rights legislation should be construed generously to further its primary purposes), any statutory ambiguities should be resolved in favor of coverage. *Armbruster v. Quinn*, 711 F.2d 1332, 1341 (6th Cir. 1983) ("Were there a doubt or ambiguity in the matter [of defining the term 'employee' under title VII,] we would resolve it in favor of coverage."); *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1978) (title VII's ambiguities should be resolved in favor of the complaining party). Indeed, courts adopting the payroll method have done so in part in recognition of the fundamental principle that title VII is a remedial statute that should be broadly interpreted to accomplish its purpose. *E.g., Thurber*, 717 F.2d at 634-35. Resolving any ambiguities in favor of the plaintiff by adopting the payroll approach is particularly appropriate here where the day-by-day approach produces such absurd results counter to title VII's purposes.

C. The Payroll Method Should Be Adopted to Ensure Consistent Interpretation of Identical Language in the Family and Medical Leave Act.

As discussed above, the day-by-day approach generates a wide range of absurd and arbitrary results that undermine the purposes of title VII and other antidiscrimination statutes. The payroll method eliminates such consequences while also ensuring consistent interpretation of identical definitional language in similar statutes.

The Family and Medical Leave Act (FMLA) adopts title VII's definition of covered employers (except that an employer must have 50, rather than 15, workers for the requisite number of weeks in order to be covered by

the FMLA). 29 U.S.C. § 2611(4)(A)(i)(1994). Both the House and the Senate Committee Reports on the FMLA explicitly approve of the use of the payroll approach when counting employees for FMLA purposes.[15] S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993); H.R. Rep. No. 8, 103d Cong., 1st Sess. 33-34 (1993). The Committee Reports state that

> "[t]he quoted language parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted this language, '[e]mploys . . . employees for each working day' is intended to mean 'employ' in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose."

S. Rep. No. 3 at 22, H.R. Rep. No. 8 at 32. Accordingly, the Department of Labor's regulations implementing the FMLA provide for use of the payroll method when determining FMLA coverage. 29 C.F.R. § 825.105(b)-(d) (1995).

Thus, the payroll method is and will be used to interpret the FMLA's definition of employer. Adopting the payroll approach when interpreting the same language in title VII (and the ADEA and ADA) would ensure consistent and harmonious interpretation of parallel definitions across employment rights statutes.

D. The Payroll Method Is Much Simpler for Parties and Enforcement Agencies to Apply.

Because employers routinely keep payroll records in order to comply with federal and state tax withholding, unemployment compensation, disability insurance, and

[15] Indeed, as discussed more fully in Petitioners' briefs, the Committee Reports also indicated that the 103rd Congress considered the payroll method to be the proper interpretation under title VII as well as the FMLA.

other legal requirements, determining employer coverage under the payroll method is relatively easy. In contrast, employers are not generally required to keep records that track the sort of information needed for a day-by-day analysis, such as the actual days each week that each employee worked or was on paid leave.

Indeed, reconstructing the records necessary to apply the day-by-day method can be very difficult and time-consuming for all the parties involved—especially overburdened agencies like the EEOC, not to mention individual plaintiffs with limited resources or who are unrepresented by counsel. In this case, for example, the parties spent eight months examining Respondent's payroll registers, time cards, work diaries and other records. R. at 37. The day-by-day approach's clumsiness actually rewards employers who keep sloppy records, allowing them to delay and confuse the proceedings. Once again, the public policy consequences of the day-by-day method dictate its rejection in favor of the payroll approach.[16]

[16] As explained more fully in the Petitioners' briefs, the EEOC's use of the payroll method is entitled to deference given the agency's primary enforcement authority for title VII and other antidiscrimination statutes. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *see also Holly Farms Corp. v. NLRB*, 64 U.S.L.W. 4269, 4271 (Apr. 23, 1996) ("Courts, in turn, must respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'") (citations omitted). As this brief demonstrates, the EEOC's use of the payroll method is by far the more reasonable approach and is thus entitled to deference.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Founded in 1971, the *Women's Legal Defense Fund* (WLDF) is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Over its 25-year history, WLDF has placed special emphasis on equal employment opportunity by challenging sex-based discrimination in the courts, and by leading efforts to promote employment policies such as the 1993 Family and Medical Leave Act and the 1978 Pregnancy Discrimination Act.

The *American Association of Retired Persons* (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-three million members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. As part of its effort to achieve dignity and equality in the workplace, AARP has filed more than 125 *amicus curiae* briefs in the United States Supreme Court, federal appellate and district courts, and state courts regarding the proper interpretation and application of federal and state anti-discrimination laws to ensure that the rights of older workers are fully protected.

The *American Association of University Women* (AAUW) has over 152,000 members in 50 states, and is dedicated to promoting education and equality for women and girls. WLDF's *amicus* brief in *Walters v. Metropolitan Educational Enterprises, Inc.* is consistent with AAUW's determination to eliminate sex discrimination for all working women.

The *American Civil Liberties Union Foundation* (ACLUF) is a nationwide, non-partisan organization of over 250,000 members. The Women's Rights Project of

the ACLUF was established to work toward the elimination of the pervasive problem of gender-based discrimination. The Women's Rights Project supports the goals of Title VII, and is opposed to judicial interpretations that unnecessarily narrow the statute's application.

The *American Federation of State, County and Municipal Employees, AFL-CIO* (AFSCME) is a nationwide labor organization with a current membership of approximately 1.3 million employees of both governmental entities and private sector employers. Many of the employees represented by AFSCME work for small employers, and are thus interested in the decision in this case, since it may determine whether their employers are subject to Title VII of the 1964 Civil Rights Act.

The *American Nurses Association* (ANA), a national labor organization and federation of registered nurses, consists of 53 state and territorial constituent organizations with over 200,000 members. With the emergence of smaller, community-based health care facilities where the number of employees may decrease, the decision in this case could serve to exclude many nurses and health care providers from the protection of the law. Given the significant impact that this case might have on whether certain nurses or employers will be excluded from the coverage of the law, ANA has a serious interest in the outcome of this case.

The *California Women's Law Center* (CWLC) is a private, non-profit public interest law center specializing in the civil rights of women and girls. Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in employment. This case raises questions within the expertise and concern of the CWLC: the CWLC has researched and analyzed state and federal civil rights laws and regulations, and provided guidance and analysis to the California legal community on the impact of court decisions pertaining to the scope of Title VII, and of the Civil Rights Act of 1991.

Therefore, the CWLC has the requisite interest and expertise to be heard by the Court in this appeal.

The *Connecticut Women's Education and Legal Fund, Inc.* (CWEALF) is a non-profit women's rights organization incorporated in 1973. It has over 1,400 members. Its mission is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society. CWEALF joins this brief as *amicus curiae* because it recognizes that part-time and hourly workers, the majority of whom are women, are entitled to the same protections guaranteed by Title VII as are full-time employees.

The *Disability Rights Education and Defense Fund, Inc.* (DREDF) is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

Equal Rights Advocates, Inc. (ERA) is a San-Francisco based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. Since its inception over 20 years ago, ERA has specialized in litigating employment discrimination cases. As discrimination against women and people of color is on the rise, it is especially important that there be avenues of redress in the federal courts.

The *International Brotherhood of Teamsters* represents 1.4 million working men and women in a large and varied range of occupations. Many of its members, for a variety of economic reasons, work on a casual or part-time basis. Since the economic climate in the United States has created more part-time jobs which are often at low wages and are filled by women and minority em-

ployees, the impact of the Seventh Circuit's decision in *Walters v. Metropolitan Educational Enterprises, Inc.* will be great. As we believe that this decision will take away protections for many of our members, and make it more difficult to negotiate for those protections, the International Brotherhood of Teamsters signs on to the Women's Legal Defense Fund's *amicus curiae* brief.

The *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* (UAW) is a labor organization of about 900,000 active members and about 500,000 retired members. For fifty years the UAW has actively promoted equal civil rights for all of its members. It has also represented and continues to represent and support its members in cases seeking to enforce Title VII of the Civil Rights Act. Accordingly, the UAW joins in the filing of this brief in support of the Petitioners.

The *Laborers' International Union of North America* (LIUNA) is a labor union with nearly 750,000 members in more than 600 locals in the U.S. and Canada, representing workers in construction, local, state and federal government, health care, custodial services, food service and hazardous waste removal. LIUNA has made equal employment opportunity a priority both within LIUNA and by joining efforts to promote strong anti-discrimination laws and policies.

Lambda Legal Defense and Education Fund, Inc. (Lambda) is the nation's largest and oldest non-profit organization dedicated to the civil rights of lesbians, gay men and all people with HIV/AIDS. Since bringing and winning the country's first AIDS discrimination case in 1983, Lambda has had a continuing involvement in the development of fair and rational policies relating to HIV/AIDS. Lambda is particularly interested and familiar with the issue presented in the case at bar because of its representation of Larry Conway, a bartender fired because he was HIV-positive. Lambda filed suit on his behalf under the Americans with Disabilities Act and under the payroll method, the employer was a covered entity. However, because of the employer's poor recordkeeping, it was impossible to prove that the employer was a covered entity under the day-to-day counting method, which ultimately resulted in a settlement of the case.

The *Mexican American Legal Defense and Educational Fund* (MALDEF) is a national non-profit legal organization established in 1967. Its principal objective is to secure the civil rights of Latinos in the United States through litigation and education. MALDEF has frequently represented plaintiffs in all phases of litigation under Title VII and appeared as an *amicus* in federal courts, including cases before this Court.

The *National Council on Family Relations* (NCFR) is a 4000 member professional organization of family life educators, researchers and therapists. The research and policy interests of our membership include the study of family well-being, the effects of divorce, the effects of income on families' well-being and the effects of wage and welfare policy. This *amicus* is particularly important to women and low income families, which have been a major focus of several sections of NCFR.

The *National Council of Jewish Women, Inc.* (NCJW), is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities around the country. Based on our National Resolutions that include working for "the enactment and enforcement of laws and regulations which protect civil rights and individual liberties for all," we join this brief.

The *National Employment Law Project* (NELP) is a non-profit organization dedicated to advocating for the

employment rights of the working poor and the unemployed. For over 25 years, NELP has worked with state and local advocates around the country, including legal services offices, community groups, and labor organizations, to advocate for workplace protections for low-wage workers and the unemployed. In addition, NELP has a long history of direct advocacy through litigation and policy work on a broad range of issues, including job training, employment discrimination, unemployment compensation reform, the employment rights of workfare participants, and most other basic employment laws, including the Family and Medical Leave Act. NELP and its constituents have a direct and sustained interest in the issue raised by this case.

The *National Women's Law Center* (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended. NWLC has a deep and abiding interest in assuring the eradication of discrimination against women in the workplace.

Founded in 1970 by leaders of the National Organization for Women, the *NOW Legal Defense and Education Fund* (NOW LDEF) is a leading non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, including employment discrimination under Title VII of the Civil Rights Act of 1964.

Wider Opportunities for Women (WOW) works nationally and in its home community of Washington, D.C. to achieve economic independence and equality for

women and girls. For more than 30 years, WOW has helped women learn to earn, with programs emphasizing literacy, technical and nontraditional skills and career development. Since 1964, WOW has trained more than 10,000 women for well-paid work. WOW is committed to equal employment policy and protection from discrimination for working women. It is our view that all workers should be covered by these laws.

The Woman Activist Fund, Inc. is a research, publicity, and consulting foundation especially dedicated to the equality and progress of women in this society. We are therefore most supportive of making sure that women are protected from discrimination and that these rights are especially available and applicable to contingent workers. We, therefore, are happy to sign on to the *amicus* brief for the Petitioner in *Walters v. Metropolitan Educational Enterprises, Inc.*

Women Employed (WE) is a national organization of working women, based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. WE works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. The organization has a long history of monitoring the performance of equal employment opportunity enforcement agencies, specifically the Department of Labor's OFCCP and the Equal Employment Opportunity Commission.

The *Women's Law Project* (WLP) is a non-profit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past 22 years of its existence, WLP's activities have included extensive work in the area of sex discrimination

in employment. WLP has a strong interest in the eradication of discrimination against women in the workplace and the availability of strong and effective remedies under Title VII of the Civil Rights Act of 1964, as amended.

Nos. 95-259 & 95-779

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In The

Supreme Court of the United States

October Term, 1995

DARLENE WALTERS AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioners,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC. AND LEONARD D. BIEBER,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE ILLINOIS STATE CHAMBER OF COMMERCE; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; ILLINOIS MANUFACTURERS' ASSOCIATION; ILLINOIS RESTAURANT ASSOCIATION; ILLINOIS RETAIL MERCHANTS ASSOCIATION; THE MANAGEMENT ASSOCIATION OF ILLINOIS; AND WISCONSIN MANUFACTURERS & COMMERCE AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are one national federation and several state associations which include among their membership more than 240,000 employers.[2] More than half the employers represented by *amici curiae* are businesses small enough to be affected by the Court's decision in this case. In the view of *amici*, the decision below properly limits the scope of federal antidiscrimination law by excluding from coverage businesses too small to bear the burden of federal enforcement, while allowing state and local enforcement agencies the opportunity to work with small businesses to eliminate invidious discrimination from the workplace.

SUMMARY OF ARGUMENT

I.

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* (1994), excludes small businesses from its coverage unless they "[*have*] fifteen or more employees *for each working day* in each of twenty or more calendar weeks." 42 U.S.C. § 2000e(b) (1994) (emphasis added). The congressional proponents and opponents of Title VII agreed that some limitation was necessary to address the following concerns: (1) small businesses would be unable to afford the cost of documenting and defending the propriety of their employment decisions; (2) federal regulation would intrude too greatly into the close relationship between employer and employees in

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

[2] Attached in the Appendix to this brief are statements of interest of each of the *amici*.

the typical small business; and (3) coverage of all employers, regardless of size, would overburden the Equal Employment Opportunity Commission ("EEOC"), which enforces Title VII, with more claims than it could handle. Congress also recognized that it was limiting only the power of the *federal government* to remedy workplace discrimination – it left the states free (indeed it encouraged them) to protect employees in small workplaces excluded from Title VII's coverage.

Congress's concerns for the burden to be placed on small businesses and for the appropriate apportionment of federal and state enforcement authority – not the "remedial" or "humanitarian" purposes behind Title VII's substantive provisions – provide the context for the Court's inquiry here. The mere fact that Title VII is "remedial legislation" does not compel this Court to adopt any arguably plausible reading of the statute that will result in the broadest possible coverage. To the contrary, when, as here, the Court is called upon to construe a statutory provision designed to *exclude* a certain class of employers from coverage, principles of "liberal construction" do not apply. The expansive interpretation of the operative language urged by petitioners would subject hundreds of thousands of small businesses to federal regulation from which they otherwise would be excluded under the reading given the definition of employer by the court of appeals. This Court need not adopt a broad construction of the employer definition to protect employees of small businesses from invidious discrimination – most states (as Congress anticipated) already have done so.

II.

Petitioners (and two courts of appeal) say an employee should be counted for each working day in any calendar week during which the employee appears "on the payroll" (*i.e.*, is entitled to some pay) *for that week*.[3] Respondents (and two other courts of appeal, including the court below) say an employee should be counted for each working day in a given calendar week for which the employee appears "on the payroll" (*i.e.*, is paid) *for that day*.[4] Only the latter interpretation gives full meaning to the phrase "for each working day." If Congress had intended that petitioners' method be used, it could have omitted this phrase and said "who has fifteen or more employees in each of twenty or more calendar weeks." The court of appeals was correct in refusing to read the statute as if it had been written this way because, as this Court has held, a statute must be construed in a way that avoids rendering words or phrases superfluous. *See Lane v. Pena*, 64 U.S.L.W. 4541, 4545 (U.S. June 18, 1996); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

III.

The legislative history of Title VII reveals why Congress sought to limit the statute's coverage, but it is silent as to why Congress included the phrase "for each working day" in the definition of employer. Earlier versions of

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[3] Petitioners refer to this as the "payroll method" of counting employees, by which they mean the "weekly payroll" method.

[4] Petitioners refer to this as the "day-by-day" method, but "daily payroll" is a better description.

the bill that became Title VII limited coverage to employers of twenty-five or more employees, but did not include any of the statutory language at issue here. That language was added to the statute because of a concern that as originally written, the statute could be construed to cover employers who had twenty-five or more employees during *any* week in a given calendar year. There was a particular concern about seasonal employers, who would have the requisite number of employees for only a few weeks per year. That explains why Congress added language requiring employers to have twenty-five or more employees "for twenty or more calendar weeks," but it sheds no light on why the phrase "for each working day" also was added to the statute.

Petitioners attempt to divine the statutory meaning from (1) a 1955 Internal Revenue Service ("IRS") ruling interpreting the Unemployment Compensation Act, 26 U.S.C. § 3306(a) (1958), and (2) congressional committee reports interpreting the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* (1994), which was passed in 1993. None of these sources sheds any light on what Congress thought in 1964 about the question before the Court (if Congress considered the question at all). While the author of Title VII's definition of employer based that definition on language taken from the Unemployment Compensation Act, the definition in that act is quite different from the one at issue here. So there is nothing to be learned from the IRS's opinion as to the meaning of the earlier statute. Nor does one senator's reference to the origin of the Title VII language imply that Congress was aware of, let alone relying on, the IRS ruling.

The Senate and House Reports on the FMLA – issued some thirty years after passage of Title VII – provide no

guidance as to Congress's intent in 1964. "[T]he interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989).

IV.

The EEOC's opinion as to the limits of its own authority is entitled to no deference here. Federal agencies are presumed to have special expertise as to subjects within their enforcement power, but they are not empowered to interpret congressional intent as to the scope of their own authority. Such questions fall within the province of the judiciary.

For all the foregoing reasons, the court of appeals should be affirmed.

ARGUMENT

I.

THE RELEVANT CONGRESSIONAL INTENTION HERE IS THE DESIRE OF CONGRESS TO AVOID PLACING ON CERTAIN SMALL BUSINESSES THE BURDEN OF ELIMINATING INVIDIOUS DISCRIMINATION FROM THE AMERICAN WORKPLACE WHILE ALLOWING THE STATES TO IMPOSE SUCH A BURDEN (AS MOST HAVE)

A. The Purposes Behind Limiting Coverage To Exclude Small Businesses

The statutory language at issue here is language of limitation and exclusion. When Congress decided to have the federal government join the fight against invidious discrimination in the American workplace, it could have extended the coverage of Title VII to every employer in

all industries affecting commerce. But Congress did not do so because it recognized that federal coverage would bring with it burdens that certain small employers should not have to bear. The broad reading petitioners would give to Title VII's definition of "employer" would undermine that congressional intention by including in Title VII's coverage many employers Congress sought to exclude.

While there was considerable debate as to where the line should be drawn, the proponents and opponents of Title VII agreed that the potential damage Title VII would bring to small businesses outweighed the benefits of eliminating discrimination from such workplaces. The limitation enacted by Congress was designed to address the following concerns: (1) small businesses would be unable to afford the cost of documenting and defending the propriety of their employment decisions;[5] (2) federal regulation would intrude too greatly into the close relationship between employer and employees in the typical small business;[6] and (3) some limitation was necessary to avoid overburdening the EEOC with more claims than it could handle.[7] Congress also recognized that it was limiting only the power of the *federal government* to remedy workplace discrimination – it left the states free (indeed it encouraged them) to protect employees in small workplaces excluded by Title VII.[8] This Court's review of the

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[5] *See, e.g.*, 110 Cong. Rec. 2708, 2711, 9594, 13088, 13092 (1964).

[6] *See, e.g.*, 110 Cong. Rec. 9601, 13085-86, 13088 (1964).

[7] *See, e.g.*, 110 Cong. Rec. 13085, 13089 (1964).

[8] *See, e.g.*, 110 Cong. Rec. 2709-10, 2712, 2714, 7214, 7216, 8193, 11936, 12688, 12708, 12724-25, 13087-90, 14313, 15882 (1964).

statutory language should be focused by these congressional desires to avoid overburdening small businesses and to apportion appropriately between federal and state governments the responsibility for remedying workplace discrimination.[9]

B. "Liberal Construction" Of The Language In Question Would Undermine The Congressional Purpose

Petitioners would have this Court focus on the "remedial" or "humanitarian" purposes of Title VII's substantive provisions, rather than on the purposes behind its limitation on coverage. It is appropriate to adopt a "liberal construction" of a remedial statute when a narrower view would take away the remedy the statute was designed to provide. Thus, for example, in *Gomez v. Toledo*, 446 U.S. 635 (1980), this Court "construed generously" pleading requirements under 42 U.S.C. § 1983 because to do otherwise would deny civil rights plaintiffs the damages remedy Congress sought to give them. *Id.* at 639. But the mere fact that Title VII is remedial legislation does not compel this Court to adopt any arguably plausible reading of the statute that will result in the broadest possible coverage. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990).

To the contrary, when, as here, the Court is called upon to construe a statutory provision designed to

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[9] When Congress reduced the coverage threshold from twenty-five to the current fifteen employees in 1972, the debate addressed the same concerns about overburdening smaller businesses and the EEOC. *See, e.g.*, 118 Cong. Rec. 671, 1513, 1526, 1841-43, 1845-46, 1975-77, 2386-91, 2393, 2409-11, 2490-91, 3132, 3135-36, 3171-72, 4907, 7567 (1972).

exclude a certain class of employers from coverage, principles of "liberal construction" do not apply and "the language can[not] be read for maximum inclusion." *Richardson v. Bedford Place Housing Phase I Associates*, 855 F. Supp. 366, 371 (N.D. Ga. 1994); *see Calderon v. Witvoet*, 999 F.2d 1101, 1104 (7th Cir. 1993) (expansive interpretation of exemption from labor standards statute would "utterly defeat [its] function"); *see also Flores v. Rios*, 36 F.3d 507, 510 (6th Cir. 1994) (when Congress has chosen to exclude a class of employers from regulatory scope of labor standards statute, court must avoid interpretation which would "eviscerate" exemption).

Contrary to petitioners' implicit assumption, the issue here is not whether to allow small businesses to discriminate, but whether to impose upon them the financial burden of supporting the federal scheme for eliminating such discrimination. In most cases of alleged discrimination filed with the EEOC in which the agency makes some determination,[10] the employer is found *not* to have violated the law.[11] Defense of meritless charges is a

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[10] A significant percentage of cases never get that far, having been closed because of EEOC failure to locate the charging party; refusal of the charging party to respond, cooperate, or accept full relief; withdrawal by the charging party; lack of EEOC jurisdiction; and other nonsubstantive reasons. Such administrative closures accounted for approximately 28.3% of EEOC total resolutions in fiscal year 1993 (20,285 out of 71,716 resolutions) and 36.4% in fiscal year 1994 (26,012 out of 71,563). *EEOC Fiscal Year 1994 Annual Report* at 11.

[11] In fiscal year 1993, "no cause" resolutions accounted for 56% of the EEOC's total resolutions and significantly outnumbered EEOC merit resolutions, which represented only 15.7% (40,183 "no cause" compared to 11,248 merit resolutions). In fiscal year 1994, "no cause" resolutions were 48.1% of total resolutions and again outnumbered merit resolutions, which accounted for 15.5%, by a wide margin (34,451 "no cause" compared to 11,100 merit resolutions). *EEOC Fiscal Year 1994 Annual Report* at 11.

burden the business community appropriately must pay to support the goal of eradicating invidious discrimination in the American workplace.[12] But it is a burden which Congress decided small employers should not have to share. By spreading the cost too broadly, petitioners' interpretation would undermine Congress's intent.

An overly broad view of coverage also threatens to intrude upon the associational interests of small employers whose freedom of association Congress sought to preserve. Here again, the issue is not whether these small businesses should be allowed to discriminate. The issue is whether employment relationships in such a small workplace should be subjected to the scrutiny of a federal agency (and potentially a federal court). Given the "intimate, personal character"[13] of most small businesses, Congress thought the owner of such a business should be allowed to hire as employees and appoint as

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[12] As one court noted, the burden can be substantial:

> Today, many Title VII cases that this court considers do not survive the pleading stage and result in a judgment in favor of the defendant. Nonetheless, the cost of success on a motion to dismiss or motion for summary judgment runs into the tens of thousands of dollars. For small economic enterprises, such outlays threaten financial viability.

Richardson, 855 F. Supp. at 371. One need only look at this case to see the potentially ruinous cost of having to litigate even one promotion decision. Metropolitan's apparent ability to afford this litigation is the exception rather than the rule among the businesses to which petitioners would extend coverage.

[13] 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey).

managers persons with whom he or she was most comfortable – even if the owner's selection methods resulted in a less diverse workforce than the ideal. If this Court accepts petitioners' overinclusive definition of "employer," tens of thousands more decisions like these will be subject to the sort of judicial second-guessing from which Congress sought to spare smaller businesses.[14]

Petitioners' statutory construction arguments also ignore Congress's desire to limit the EEOC's caseload to manageable levels and to share enforcement responsibility with the states.[15] The EEOC's backlog of pending cases already has grown to a level which significantly impairs its ability to enforce the federal antidiscrimination statutes.[16] One can imagine the effect of adding several hundred thousand more employers and several million more employees[17] to the classes covered by Title

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[14] The EEOC here found no reasonable cause to believe that respondents discriminated against petitioner Darlene Walters ("Walters") because of her gender. Yet under the federal enforcement scheme, she was still entitled to bring this claim to a federal district court.

[15] *See, e.g.*, 110 Cong. Rec. 13085, 13089 (1964).

[16] As of fiscal year 1994, the EEOC's backlog of cases stood at 97,000, after a year in which a record-breaking number of charges were received. *EEOC Fiscal Year 1994 Annual Report* at 31. The EEOC's own annual report complains repeatedly about insufficient staffing in the face of the flood of charges it has received in recent years. *Id.* at 3, 12.

This case is a good example of the effect the backlog can have. The EEOC filed its complaint in the district court *three years* after petitioner Walters's employment was terminated (allegedly in retaliation for filing a charge with the EEOC).

[17] According to the statistics relied upon by petitioners' *amici*, nearly 800,000 employers, employing more than 10

VII, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (1994), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (1994).[18] If this Court affirms the court of appeals, and Congress is unhappy with that decision, it can change the statutory definition and (presumably) give the EEOC sufficient resources to handle the resulting increase in its caseload. But the potentially devastating impact of such an increase on the EEOC's already overburdened operation argues against a broad construction of the statute by this Court.

C. The States Can (And Most Do) Fill Any Gaps In Coverage

Petitioners predict that affirmance here will leave millions of workers without protection from invidious discrimination. But this Court need not adopt a broad construction of the employer definition to protect these employees – most states (as Congress anticipated) already have done so. Thirty-five states, the District of Columbia, Puerto Rico and the Virgin Islands have enacted laws similar to Title VII covering employers with *fewer* than fifteen employees.[19] Twelve states have a fifteen-

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million persons, report that they have ten to nineteen employees. Bureau of the Census, Dep't of Comm., *County Business Patterns 1993*, fig. 1 (1995).

[18] The ADA and ADEA definitions of employer contain language identical to that the Court will construe in this case. *See* 42 U.S.C. § 12111(5)(A) (1994); 29 U.S.C. § 630(b) (1994).

[19] *See* Alaska Stat. § 18.80.300 (Supp. Oct. 1995) (one employee); Ark. Code Ann. § 16-123-102(5) (Michie Supp. 1995) (nine employees); Cal. Gov't Code § 12926(d) (West Supp. 1996) (five employees); Colo. Rev. Stat. § 24-34-401 (1988) (one employee); Conn. Gen. Stat. Ann. § 46a-51(10) (West 1995) (three

employee threshold,[20] but three of these have omitted the phrase "for each working day" from their definitions of

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employees); Del. Code Ann. tit. 19 § 710(2) (1995) (four employees); D.C. Code Ann. § 1-2502 (1981) (one employee); Haw. Rev. Stat. § 378-1 (1994) (one employee); Idaho Code § 67-5902 (1995) (five employees); Ind. Code Ann. § 22-9-1-3 (West Supp. 1996) (six employees); Iowa Code Ann. § 216.2(7) (West 1994) (one employee); Kan. Stat. Ann. § 44-1002(b) (1993) (four employees); Ky. Rev. Stat. Ann. § 344.030 (Michie/Bobbs-Merrill Supp. 1994) (eight employees); Me. Rev. Stat. Ann. tit. 5 § 4553(4) (West Supp. 1995) (one employee); Mass. Gen. L. Ann. ch. 1518 § 1(5) (West 1996) (six employees); Mich. Comp. Laws Ann. § 37.2201(a) (West 1985) (one employee); Minn. Stat. Ann. § 363.01(17) (West 1991) (one employee); Mo. Rev. Stat. § 213.010 (Vernon Supp. 1996) (six employees); Mont. Code Ann. § 49-2-101(8) (1995) (one employee); N.H. Rev. Stat. § 354-A:2(7) (1995) (six employees); N.J. Stat. Ann. § 10:5-5(e) (West Supp. 1996) (one employee); N.M. Stat. Ann. § 28-1-2(B) (Michie Supp. 1995) (four employees); N.Y. Exec. Law § 15-292(5) (Consol. 1995) (four employees); N.D. Cent. Code § 14-02.4-02(5) (1991 & Supp. 1995) (one employee); Ohio Rev. Code Ann. § 4112.01(2) (Baldwin 1994) (four employees); Or. Rev. Stat. § 659.010(6) (Supp. 1994) (one employee); Pa. Cons. Stat. § 954 (Supp. 1996) (four employees); P.R. Laws Ann. tit. 29 § 146 (1995) (one employee); R.I. Gen. Laws § 28-5-6 (1995) (four employees); S.D. Codified Laws Ann. § 20-13-1(7) (1995) (one employee); Tenn. Code Ann. § 4-21-102(4) (Supp. 1995) (eight employees); Vt. Stat. Ann. tit. 21 § 494(1) (1987) (one employee); V.I. Code Ann. tit. 24 § 421(2) (1993) (one employee); Va. Code Ann. § 2.1-715 (Michie 1995) (one employee); Wash. Rev. Code Ann. § 49.60.040 (West Supp. 1996) (eight employees); W. Va. Code § 5-11-3(d) (Supp. 1996) (twelve employees); Wis. Stat. Ann. § 111.32(6) (West 1988) (one employee); Wyo. Stat. § 27-9-102(b) (June 1991) (two employees).

[20] *See* Ariz. Rev. Stat. Ann. § 41-1461 (Supp. 1995); Fla. Stat. Ann. § 760.02(7) (West 1986 and Supp. 1995); Ill. Comp. Stat. Ann. ch. 775 para. 5/2-101(B)(1)(a) (1993); La. Rev. Stat. Ann. § 23:1006(A) (West 1985); Md. Ann. Code art. 49B § 15(b) (1994); Neb. Rev. Stat. § 48-1102(2) (1993); Nev. Rev. Stat. Ann. § 613.310

"employer."[21] Only three states have no statute prohibiting discrimination by private employers based on the characteristics protected under Title VII.[22]

When it enacted Title VII, Congress not only allowed for concurrent jurisdiction with the states, but it also *required* that the states have the initial opportunity to process a discrimination charge if they chose to do so.[23]

(Michie 1996); N.C. Gen. Stat. § 143-422.2 (1993); Okla. Stat. Ann. tit. 25 § 1301(1) (West Supp. 1996); S.C. Code Ann. § 1-13-30(e) (Law. Co-op 1986); Tex. Lab. Code Ann. § 21-002(8)(A) (West 1996); Utah Code Ann. § 34-35-2(7) (1994).

[21] *See* Ill. Comp. Stat. Ann. ch. 775 para. 5/2-101(B)(1)(a) (1993); La. Rev. Stat. Ann. § 23:1006(A) (West 1985); N.C. Gen. Stat. § 143-422.2 (1993).

[22] The states are Alabama, Georgia, and Mississippi. Georgia and Mississippi prohibit discrimination by public employers based on the characteristics protected under Title VII. *See* Ga. Code Ann. 45-19-21 (1990 & Supp. 1996); Miss. Code. Ann. § 25-9-149 (1991). Alabama has prohibited discrimination by public employers based on race or sex in a general appropriations act. 191 Ala. Acts 859.

[23] Under Title VII, a charge may not be deemed filed with the EEOC unless and until (1) the complainant files his charge with an appropriate agency in the state in which the discrimination allegedly took place and (2) either sixty days pass or that agency earlier terminates its proceedings. 42 U.S.C. § 2000e-5(c) (1994); *see EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 110-11 (1988); *Mohasco Corp. v. Silver*, 447 U.S. 807, 817 (1980); *see also Oscar Mayer Co. v. Evans*, 441 U.S. 750, 756 (1979). "Resort to appropriate state proceedings is mandatory, not optional." *Oscar Mayer*, 441 U.S. at 756 n.3. This deferral requirement "is intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination." *Oscar Mayer*, 441 U.S. at 755; *see Commercial Office Products*, 486 U.S. at 110-11; *Mohasco*, 447 U.S. at 821.

Affirmance of the court of appeals may mean that some employees will have to turn to state and local fair employment agencies for relief, but that is exactly what Congress anticipated would happen in a dual enforcement scheme. Proponents of Title VII emphasized that state enforcement agencies would have "primary, exclusive jurisdiction . . . for a sufficient period of time to let them work out their own problems at the local level." 110 Cong. Rec. 13087 (1964) (remarks of Sen. Dirksen). Senator Humphrey, a principal sponsor of Title VII, pointed out that the statute "encourage[d] the States and the local communities to take a greater share of the responsibility in carrying out the equal protection of the laws and equal rights within the laws." 110 Cong. Rec. 11936 (1964). One representative noted that in states with effective anti-discrimination laws, "there will be no cause for the Federal Government to intrude in these areas at all." 110 Cong. Rec. 2710 (1964) (quoted statement of Rep. McCulloch). Senator Saltonstall urged his colleagues to support the Dirksen-Mansfield substitute which became Title VII because it "provide[d] greater opportunity for fair employment problems to be settled locally. This is very important in the 30 States which already have fair employment laws and which settle their problems locally, in one way or another." 110 Cong. Rec. 13089 (1964).

To the extent a narrower interpretation of Title VII coverage results in greater reliance on state enforcement, it also serves the congressional purpose of reducing the regulatory burden on small employers. Since the EEOC only can investigate and conciliate claims, but not adjudicate them, Title VII enforcement actually occurs in federal courts, with all the attendant financial burdens of federal

litigation.[24] The proponents of Title VII presumed that deferral to state enforcement would "promote 'time economy and the expeditious handling of cases.' " *Commercial Office Products*, 486 U.S. at 118 (quoting remarks of Sen. Dirksen at 110 Cong. Rec. 9790 (1964)); *see id.* at 119 n.4 ("deferral provisions will 'assure individual complainants that they will have fair and expeditious consideration of their grievances' ") (quoting remarks of Sen. Dirksen at 110 Cong. Rec. 8193 (1964)); *see also* 110 Cong. Rec. 13087 (1964) (remarks of Sen. Dirksen); *id.* at 13089 (remarks of Sen. Saltonstall).

D. Petitioners' Statistical Analysis Of The 1990s Workplace Sheds No Light On Congress's Intent In 1964

Petitioners say the Seventh Circuit's method of counting employees will exclude many small businesses that hire "part-time employees" (by which they mean employees who work fewer than all the "working days" in each calendar week). Relying on recent statistics, they say that minority and female employees make up a disproportionate number of the part-time workforce and that the Seventh Circuit's decision will exclude these individuals from federal antidiscrimination protection.[25] But Congress knew when it limited coverage that some minority and female employees would be excluded from federal protection. Petitioners' analysis shows how large

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[24] Indeed, a complainant may request the right to sue before the EEOC even has completed its investigation. *See* 42 U.S.C. § 2000e-5(e)(1) (1994); 29 C.F.R. § 1601.28(a)(1),(2) (1995); *see also Sims v. Trus Joist MacMillan*, 22 F.3d 1059, 1061-63 (11th Cir. 1994).

[25] The statute Congress passed, of course, protects equally employees of all races and both genders. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-80 (1976).

the number may be in 1996, but it has nothing to do with what Congress intended in 1964. The appropriate inquiry here is what interpretation best serves the congressional purposes of limiting the burden on small businesses and on the federal enforcement scheme, not on what classes of employees Congress intended to protect.[26]

Petitioners' statistics regarding flex-time scheduling in the 1990s also provide no guidance to congressional intent in 1964. Besides being irrelevant, petitioners' statistics overestimate the impact of such scheduling on coverage of small businesses. While many employers today do offer flexible scheduling, this often means that employees are allowed to leave earlier or come in later, not that they are working "compressed work weeks." Some employers have adjusted their production schedules to allow employees to complete in four days of longer hours what they used to do in five days of shorter hours. But there is no reason to believe that this practice is widespread in the *smaller workplaces at issue in this case*.[27] Compressed

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[26] If petitioners are correct when they say smaller businesses are hiring a disproportionate number of minority and female employees, then these businesses may be less in need of federal regulation than petitioners believe. An employer who hires someone with a protected characteristic is less likely to take adverse action against that person based on the same characteristic. *See Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994); *LeBlanc v. Great American Insurance Co.*, 6 F.3d 836, 847 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994); *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174-75 (8th Cir. 1992); *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991).

[27] Indeed, the statistics offered by *Amici* Women's Legal Defense Fund *et al.* are based in part on a private study of "major U.S. employers." Brief of the Women's Legal Defense Fund *et al.* as *Amici Curiae*, p. 8 n.11. Petitioner Walters says respondent Metropolitan Educational Enterprises, Inc.

work weeks are much more common in large workplaces, where employers have enough workers to adopt more flexible scheduling. With fewer employees to go around, smaller businesses generally cannot do that. Nor does a "compressed work week" necessarily result in loss of coverage under Title VII. An employer with fifteen employees working ten hours a day for four "working days" is covered by Title VII just like an employer with fifteen employees working five days at eight hours.

E. There Is No Reason To Believe Small Businesses Will Manipulate Scheduling To Avoid Coverage

Petitioners also speculate that the court of appeals' decision will cause a parade of cases in which small businesses manipulate their scheduling to avoid Title VII coverage. But as the Seventh Circuit noted, "In more than a decade since this court ruled in *Zimmerman*, this parade has had conspicuously few participants." *EEOC v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1230 (7th Cir. 1995). Indeed, none of the reported cases involved alleged manipulation.

Nor is there any reason to believe that such manipulation occurs in small businesses. First of all, few small employers are likely even to be aware of the counting issue raised by this case. Secondly, the owner of a small business will be much more concerned about having enough employees around to produce products and serve customers than with the effect of scheduling on Title VII coverage. Finally, in most states, the small employer still will be subject to state antidiscrimination laws no matter

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("Metropolitan") engaged in flexible scheduling, but Metropolitan, a company operating nationwide, is not the typical small business.

how work schedules are manipulated, so there is little incentive for such manipulation. In fact, petitioners' counting method may be more likely to have an adverse effect on the classes of workers about which petitioners are concerned. If all part-time employees count for the entire week, regardless of which days they work, small businesses may be less likely to hire the student, retiree, or homemaker who is able to work only on certain days.

F. The Seventh Circuit's Counting Method Generally Will Be Simple To Apply

According to petitioners, their method of counting is easier than the Seventh Circuit's, as if this somehow makes a difference. There is no evidence Congress was looking for simplicity here, and history tells us that Congress is not adverse to making calculations complex. (*See, e.g.*, substantial portions of the Internal Revenue Code.) Petitioners also overestimate the complexity of the method of counting adopted by the Seventh Circuit[28] and underestimate the burdens of the "payroll method." The Seventh Circuit's method of counting requires that one look at the "payroll" (*i.e.*, who is being paid) for each working day in each calendar week. The method favored

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[28] There is no reason to believe that the amount of time spent by the parties' lawyers here is typical. If time and payroll records are kept in an orderly fashion, the task of preparing a daily headcount should be "an extremely simple task, as evidenced by the dearth of cases in which this issue is dispositive." *Goudeau v. Dental Health Services, Inc.*, 901 F. Supp. 1139, 1144 (M.D. La. 1995). "It is more likely that since only small employers will contend that they are not covered by Title VII, the amount of documents which would reflect the employees at work on any given day – such as time cards and work schedules – is unlikely to be substantial." *Id.*

by petitioners requires that one look at the "payroll" for the entire *calendar* week. But most employers pay their employees on a biweekly or semimonthly basis, and those employers with weekly pay periods often designate a workweek different from the calendar week. So *under either method*, one must look at some record to determine an hourly employee's status on each working day of a given calendar week.

Petitioners say their method requires that one look only at records required by federal and state law, but that is equally true of the method approved below. Contrary to petitioners' assertion, federal and most state laws require that employers keep for hourly employees[29] a record of "hours worked each workday." 29 C.F.R. § 516.2(a)(7) (1995).[30] Employers routinely keep such records. Rare is the workplace in which hourly workers do not have either a time clock or a sign-in sheet. Indeed, without such records, employers would be unable to fulfill their obligations under the Fair Labor Standards Act and corresponding state statutes to pay hourly employees a premium rate for hours worked in excess of forty per workweek. *See* 29 U.S.C. § 207 (1994); *see also, e.g.*, Ill. Comp. Stat. Ann. ch. 820 para. 105/4a (1993 & Supp. 1996).

An example of a common pay arrangement illustrates the situation under both counting methods. Assume a pay period beginning on the first of the month and ending on the fifteenth. Such a pay period in all cases includes all or part of *three calendar weeks*. Since the

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[29] Salaried employees count for all working days in each calendar week under either method.

[30] Most states have similar requirements. *See, e.g.*, Ill. Comp. Stat. Ann. ch. 820 para. 105/8 (1993).

payroll record for the pay period will show only total hours worked, it will be necessary to examine daily time records *under either method* to determine who was on the payroll for each working day of all three calendar weeks. So in most instances, the task of determining coverage under either method will impose a similar burden. There is no merit to petitioners' argument that their method is so much simpler that Congress must have had it in mind when it passed the relevant language.

II.

THE DAILY PAYROLL METHOD AVOIDS RENDERING THE PHRASE "FOR EACH WORKING DAY" SUPERFLUOUS

An employer is subject to Title VII coverage if (during the relevant years) it "*has* fifteen or more employees *for each working day* in each of twenty or more calendar weeks." 42 U.S.C. § 2000e(b) (emphasis added). Given that several court of appeals panels have disagreed as to the meaning of the italicized language (with each implying that the language clearly supported its view), it is difficult to say that the language has a "plain meaning." But there is only one meaning that avoids rendering the phrase "for each working day" superfluous, and that is the meaning adopted by the Seventh Circuit.

Petitioners say an employee should be counted for each working day in any calendar week during which the employee appears "on the payroll" (*i.e.*, is entitled to some pay)[31] *for that week*. The court of appeals held that

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[31] A "payroll" is a "paymaster's or employer's list of those entitled to receive compensation at a given time and of the amounts due to each." Webster's Third New International Dictionary, 1659 (def. 1) (1981). Although it is not entirely clear

an employee should be counted for each working day in a given calendar week for which the employee appears "on the payroll" (*i.e.*, is paid) *for that day*. Only the latter interpretation gives full meaning to the phrase "for each working day." If Congress had intended that petitioners' method be used, it could have left this phrase out and said "who has fifteen or more employees in each of twenty or more calendar weeks." The court of appeals was correct in refusing to read the statute as if it had been written this way because, as it had held some thirteen years earlier, a court "should not construe a statute in a way that makes words or phrases meaningless, redundant or superfluous." *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353 (7th Cir. 1983); *see Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant"); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("[A] statute must, if possible, be construed in such fashion that every word has some operative effect"); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' ") (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)); *see also Lane v. Pena*, 64 U.S.L.W. 4541, 4545 (U.S. June 18, 1996) (refusing to adopt construction which would render statutory language "entirely superfluous").

Petitioners focus on the word "has," contending that it implies coverage whenever the employee has a continuing employment relationship with the employer

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from the decisions of the First and Fifth Circuits or from petitioners' briefs, the "payroll method" they support presumably would not include in any given calendar week an employee off for the entire calendar week on an *unpaid* leave of absence.

throughout a given calendar week. But that reading does not explain why the phrase "for each working day" is included in the statute. "[A] word is known by the company it keeps." *Gustafson*, 115 S. Ct. at 1069. If Congress was focusing on the existence of an employment relationship during a given week, it would not have followed the word "has" with the phrase "for each working day." Petitioners' reliance on the continuing nature of an employment relationship in other contexts or under other statutes ignores the purpose of the statutory language here – to measure the size of employers and exclude those too small to bear the burden of federal coverage. A part-time employee may have an "employment relationship" on each day of a given calendar week for purposes of determining seniority or health insurance coverage, but that does not mean the employee counts under a statutory measure of coverage which focuses on "each working day."

Petitioners concede that an employee who enters or departs employment in midweek does not count for that week under their method.[32] They say this gives meaning to the phrase "for each working day," which it does – the same meaning respondents give the phrase (*i.e.*, that an employee does not count for a given day unless he or she is entitled to pay for the day). There is nothing in the text of the statute or its legislative history to support petitioners' restrictive view of the purpose of the operative language. According to petitioners, a part-time employee who works on Monday and Tuesday but then quits does

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[32] Under the Seventh Circuit's method, the employee *would* count for each day on which he or she works, thus *increasing* the likelihood of coverage that week, especially if the employee is replaced immediately.

not count for the balance of the week. According to respondents, an employee who works on Monday and Tuesday and is not scheduled for the rest of the week does not count for the balance of the week. Given that Congress's intent was to measure the size of the employer's *business* (not the size of its total *workforce*), there is no principled reason to conclude that Congress intended one result in the former case and a different result in the latter.

A test which focuses on employment relationships also is overinclusive. If every part-time employee counts for the entire week, Title VII will be extended to hundreds of thousands of small businesses of the type Congress meant to exclude. The number of employees it takes to accomplish the employer's daily business on its working days is a truer measure of the employer's size (the question the statutory language was designed to answer) than is the total number of employees on the weekly payroll. A business which needs twelve employees to accomplish its goals on each working day is a twelve-employee business, even if it staffs its workforce with ten full-time and five part-time employees.

Petitioners suggest various scenarios in which the Seventh Circuit's counting method produces results they consider "absurd" or "bizarre." But either method under consideration here can have odd results. As the Seventh Circuit pointed out in *Zimmerman*, under petitioners' method, an hourly worker who works two hours each Monday would be counted as an employee for every day of the week. 704 F.2d at 354. Such overinclusiveness would defeat Congress's goal of limiting statutory coverage to those employers able to afford the burden of enforcement. If the Seventh Circuit's method excludes some employers who would have been included had

Congress written a different test, then it is up to Congress to amend the statute or the states to provide protection (as most have). The answer cannot be to force a construction of the statute which includes too many employers simply to insure coverage of a few that would otherwise be excluded, especially when that construction does not give full meaning to the statutory language.

III.

THE LEGISLATIVE HISTORY IS SILENT ON THE QUESTION BEFORE THE COURT

While the legislative history of Title VII reveals why Congress sought to limit the statute's coverage, it is silent as to why Congress included the phrase "for each working day" in the definition of employer. Petitioners nevertheless attempt to divine the statutory meaning from (1) a 1955 Internal Revenue Service ("IRS") ruling interpreting a statute with language different from that at issue here, and (2) congressional committee reports interpreting a statute passed in 1993. None of these sources sheds any light on what Congress thought in 1964 about the question before the Court (if Congress considered the question at all).

Earlier versions of the bill that became Title VII limited coverage to employers of twenty-five or more employees, but did not include any of the statutory language at issue here. *See* H.R. 7152, 88th Cong., 1st Sess. (1963). That language was added to the statute because of a concern that, as originally written, the statute could be construed to cover employers who had twenty-five or more employees during *any* week in a given calendar year. *See, e.g.*, 110 Cong. Rec. 6450 (1964). There was a particular concern about seasonal employers, who would have the requisite number of employees for only a few

weeks per year. *See, e.g., id.* at 2711, 6450, 7216-17, 13087-88. That explains why the Senate added language requiring employers to have twenty-five or more employees "for twenty or more calendar weeks." *Id.* at 13087-88. But it sheds no light on why the phrase "for each working day" also was added to the statute.

During debate, Senator Dirksen explained that the new version of the definition was based on language in the Unemployment Compensation Act. 110 Cong. Rec. 13087 (1964). But the language of the two statutes differed significantly. The Unemployment Compensation Act stated:

> [T]he term "employer" does not include any person unless *on each of some twenty days during the taxable year, each day being in a different calendar week,* the total number of individuals who are *employed by him in employment* for some portion of the day (whether or not at the same moment of time) was four or more.

26 U.S.C. § 3306(a) (1958) (emphasis added). Given this language, it is not surprising the IRS had ruled that part-time employees counted for each week of their employment, even if they did not work on certain days of the week. Rev. Rul. 55-19, 1955-1 C.B. 496, 497 (1955). The Act's definition required only that an employee be "employed . . . in employment" twenty days, each day being in a different calendar week. 26 U.S.C. § 3306(a) (1958) (emphasis added). That test is quite different from Title VII's requirement that an employer have the requisite number of employees *"for each working day"* during twenty or more calendar weeks.[33] So the IRS ruling interpreting different language sheds no light on the meaning

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[33] *See Richardson v. Bedford Place Housing Phase I Associates*, 855 F. Supp. 366, 369 (N.D. Ga. 1994) ("Had Congress intended

of the phrase "for each working day" in Title VII. Nor does Senator Dirksen's reference to the *origin* of the language imply that Congress was aware of, let alone relying on, the IRS ruling. *See* 110 Cong. Rec. 13087 (1964).

Petitioners also cite favorable comments about the "payroll method" made in the Senate and House Reports on the FMLA some thirty years after passage of the language in question here. As this Court has said, "[T]he interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989).[34] " 'It is the intent of the Congress that enacted [the statute] . . . that controls.' " *Oscar Mayer*, 441 U.S. at 758 (quoting *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977)). Despite the fact that *Zimmerman* was decided some thirteen years ago, Congress has done nothing to amend Title VII to reflect disapproval of *Zimmerman*'s holding. When Congress disapproved of this Court's holdings in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), it took little time overruling those decisions in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 and 42 U.S.C. § 2000e-2(m)). That is the only way Congress can change the law – it cannot do so by suggesting a

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to base the definition of employer on the Unemployment Compensation Act, it would have used far more similar language.")

[34] *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980); *United States v. Clark*, 445 U.S. 23, 33 (1980); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).

different interpretation in comments made about a statute thirty years after it was passed.

If this Court were inclined to review subsequent legislative history, it would find that Congress continued to express concern over the burdens of federal enforcement on small businesses when it amended Title VII to lower the employee threshold in 1972.[35] At that time, the legislative history also reflects a continuing concern about the appropriate apportionment of federal and state responsibility in this area and about the effect of expanded coverage on the EEOC's workload.[36]

In 1989, when it passed the ADA, Congress still was concerned about the burden placed on small businesses by federal regulation. *See, e.g.*, 135 Cong. Rec. S10737-50 (1989). That concern was reflected in questions about the ADA's definition of "employer" (the same definition at issue here):

> Mr. BOSCHWITZ. . . . We need to get an idea of what [the ADA's] impact will be on small business. . . .
>
> Let me first, ask when you talk about employment, does the 15 or less [sic] employees mean full time or part time employees?
>
> Mr. KENNEDY. . . . I believe it is full time employees, those who work more than 22 hours a week.

135 Cong. Rec. S10750 (1989). While Senator Kennedy's reference to "22 hours" was wrong, his understanding that only certain "full time employees" counted shows that Congress had not accepted the "payroll method" as

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[35] *See* 118 Cong. Rec. 671, 1526, 1841-43, 1845-46, 1975-77, 2387-91, 3132, 3135, 3171-72, 4907 (1972).

[36] *See, e.g.*, 118 Cong. Rec. 1513, 2386, 2409, 3133, 3136 (1972).

the proper interpretation of the language at issue here. *See* 135 Cong. Rec. S10752-53 (1989) (remarks of Sen. Harkin) (employees who work fewer than 20 hours do not count).

Petitioners also urge this Court to adopt the "payroll method" so that enforcement of Title VII will be consistent with that of the FMLA. But Congress apparently had no such concern. When it enacted the FMLA, it set the employee threshold much higher (fifty),[37] and it excluded many part-time employees[38] and all employees for the first twelve months of their employment,[39] exclusions not made in Title VII, the ADA, or the ADEA.

IV.

THE EEOC'S OPINION AS TO THE LIMITS OF ITS OWN AUTHORITY IS ENTITLED TO NO DEFERENCE

Relying on an EEOC "Policy Statement" issued in 1990 and an EEOC general counsel opinion issued in 1966, petitioners urge this Court to defer to the EEOC's judgment as to the proper counting method here. Federal agencies are presumed to have special expertise as to subjects within their enforcement power, and deference to that expertise often is warranted. But federal agencies are not empowered to interpret congressional intent as to the scope of their own authority.

The cases upon which petitioners rely do not support deference here. For example, in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), this Court was deferring to

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[37] 29 U.S.C. § 2611(4)(A)(i) (1994).

[38] In order to be eligible for FMLA leave, an employee must have worked 1,250 hours in the twelve months prior to the date on which leave commences. 29 U.S.C. § 2611(2)(A)(ii) (1994).

[39] 29 U.S.C. § 2611(2)(A)(i) (1994).

the EEOC's judgment as to when state proceedings on a charge of discrimination have been "terminated" under Title VII's deferral provision (42 U.S.C. § 2000e-5(e) (1994)). *Id.* at 114-16. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court was examining the Environmental Protection Agency's interpretation of substantive provisions of the Clean Air Act. These were matters within the particular expertise of these agencies, and deference to that expertise was appropriate. But questions about the scope of an agency's authority fall within the province of the judiciary. *See Missouri v. Andrews*, 787 F.2d 270, 286 (8th Cir. 1986) (citing *Harmon v. Brucker*, 355 U.S. 579, 582 (1958); *Social Security Board v. Nierotko*, 327 U.S. 358, 368 (1946)), *aff'd sub nom. ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1987). As the Eighth Circuit said in *Andrews*:

> The *Chevron* rule requires deference only where an agency reasonably construes the applicable statute on a matter which is within its jurisdiction to decide. The limits of an administrative agency's statutory authority remains [sic] an issue suitable for judicial resolution.

Andrews, 787 F.2d at 286. "[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983). As the court of appeals said, it would be particularly inappropriate to give any deference to the 1990 guideline, which was issued long after *Zimmerman* had rejected the EEOC's view. *Metropolitan*, 60 F.3d at 1230.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

The Illinois State Chamber of Commerce (the "Illinois Chamber") includes among its members more than 4,000 employers, who employ more than one million workers throughout the State of Illinois, and several hundred other organizations such as local chambers of commerce and trade and professional associations. Nearly one-third of the Illinois Chamber's employer members are small businesses that will be affected by the Court's decision in this case. The issue raised in this case is of great importance to the Illinois Chamber's smaller business members because of the disproportionate burden in time and costs such businesses would have to bear should the scope of Title VII be extended beyond the limit set by the Seventh Circuit.

The Chamber of Commerce of the United States of America (the "Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Over half of the Chamber's 215,000 members will be affected by the Court's decision in this case.

The Illinois Manufacturers' Association ("IMA") is the oldest and largest statewide manufacturing association in the United States. IMA provides information and advocacy on behalf of member companies in such areas

as industrial relations, federal and state regulation, insurance, public affairs, and environmental, judicial and economic issues as they relate to the Illinois business climate. IMA's 5,000 members employ more than 80% of the total Illinois manufacturing workforce. A significant percentage of IMA's member companies employ fewer than twenty-five persons and thus are small enough to be affected by the outcome here.

The Illinois Restaurant Association (the "Association") represents 2,500 employers at more than 7,000 establishments across the State of Illinois. The Association's mission is to promote and strengthen the restaurant industry; champion industry concerns and interests; provide leadership and education; and be of service to the community. Approximately 25% of the Association's members operate small establishments which will be affected by the Court's decision in this case.

The Illinois Retail Merchants Association ("IRMA") is an Illinois not-for-profit trade association which is recognized as the spokesman for Illinois retailing. Within its membership are retailers in all merchandise lines located throughout Illinois. Direct membership includes approximately 10,000 food and non-food retailers ranging in size from small "Mom and Pop" businesses to national chains. Subscribing memberships held by local chambers of commerce, retail committees, and shopping center organizations raise IRMA's membership to over 25,000 Illinois retailers which account for approximately 85% of all retail sales in Illinois.

The Management Association of Illinois (the "Association") provides human resources, training, organizational development and employment law lobbying services to Illinois employers. Established in 1898, the Association is dedicated to delivering innovative business solutions leading to growth and financial stability for its over 1,000 members.

Wisconsin Manufacturers & Commerce ("WMC") is Wisconsin's largest business association, representing approximately 3,600 member firms which employ 500,000 employees throughout the State of Wisconsin. WMC is dedicated to fostering and advancing policies which promote the public interest in business development and a healthy business climate. The Wisconsin Fair Employment Act covers all employers, regardless of size, and thus protects all Wisconsin employees against unlawful discrimination. Thus, WMC believes there is no need to impose the additional burden of federal enforcement on the substantial number of small businesses represented by WMC.

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Nos. 95-779 and 95-259

In the Supreme Court of the United States

October Term, 1995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., and LEONARD D. BIEBER, *Respondents*.

DARLENE WALTERS, *Petitioner*,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., and LEONARD D. BIEBER, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

Per Petitioner Equal Employment Opportunity Commission:

The Prohibition against employment discrimination set forth in Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e(b), applies to an employer "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." The question presented is:

Whether an hourly paid employee who has an ongoing employment relationship with a person, as reflected by the employee's inclusion on the person's payroll, is counted as an employee of that person for purposes of Section 2000e(b) on days when the employee is not at work or on paid leave.

Per Petitioner Darlene Walters:

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (1988 & Supp. V. 1993), applies only to an "employer," defined in Section 701(b), 42 U.S.C. § 2000e(b), (1988), to be "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."

The question presented is:

Whether that jurisdictional definition is satisfied when an employer maintains fifteen or more employees on the payroll for the requisite number of weeks even though fewer than fifteen employees report to work or are on paid leave on each day of each such week, as to which the courts of appeals are in direct conflict.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned

citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has previously participated in cases concerning Title VII. For example, PLF participated as amicus curiae before this Court in *United Steelworkers of America AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987), and *Martin v. Wilks*, 490 U.S. 755 (1989). Amicus PLF seeks to augment the argument in the respondents' brief. PLF believes that its public policy perspective and litigation experience dealing with Title VII will provide an additional viewpoint with respect to the legal issues presented.

The National Federation of Independent Business (NFIB) is the nation's largest advocacy organization representing small and independent businesses. With an audited membership of more than 600,000 business owners, NFIB is a melting pot of commercial enterprise, high-tech manufacturers, family farmers, neighborhood retailers, and service companies. Founded a half century ago in 1943, NFIB was created to give small and independent business a voice in governmental decision making. Today, the organization remains true to its charter of advancing the concerns of small business owners among state and federal legislators and regulators.

In joining as amicus on this brief, NFIB does not mean to suggest that Congress' definition of "employer" in Title VII of the Civil Rights Act of 1964 is an adequate or appropriate statutory method of determining which small businesses are exempt from the jurisdiction of this Act. NFIB believes that Congress would do well to amend this

statute to define "employer" in a way that better reflects the modern workplace, as long as the general policy of protecting small businesses from excessive regulatory burdens and fostering their economic interests is kept intact. In the past the NFIB has supported legislation which defined businesses exempt from federal regulatory statutes based on the number of hours worked. We believe that this is a much more practical statutory approach for providing that seasonal and part-time employees are not counted towards an exemption threshold. Until Congress does amend this statute, however, NFIB believes that EEOC must comply with the plain meaning of the statute as advocated herein. EEOC's current interpretation is ultra vires and invalid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and violates a clear congressional intent to exclude seasonal and part-time employees from those counted to reach the threshold of fifteen. If EEOC's definition is allowed to stand, thousands of small employers who have considered themselves safe from the burdensome regulatory reach of government will no longer have that safety. In addition, as the Court is aware, small business exemptions currently drafted in the Age Discrimination in Employment Act and the Americans with Disabilities Act would also likely be weakened. In many major federal regulatory statutes, Congress has seen fit to exempt small businesses from excessive regulatory burdens. In its disregard of the plain language of Title VII, EEOC has undermined this intent. If EEOC's violation of its delegated authority is not checked, it is likely that other agencies will follow suit, and laws designed to protect small business will continue to be eroded.

Pursuant to Rule 37.3, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioner Darlene Walters was an employee of respondent Metropolitan Educational Enterprises, Inc. (MEE), from 1986 to 1990. *Brief for the Equal Employment Opportunity Commission* at 3 (*EEOC Brief*). Ms. Walters voluntarily resigned from her position with MEE on April 10, 1990. *Respondent's Brief in Opposition to Petition for Writ of Certiorari* at 2 (*Resp. Brief in Opp.*). On April 12, 1990, she filed a charge of gender discrimination with petitioner Equal Employment Opportunity Commission (EEOC) against MEE, based upon MEE's denial of her application for a promotion eight months previously. *Id.* The EEOC subsequently concluded that, because the individual hired for the job in question was better qualified for the position than Ms. Walters, the evidence did not establish a violation of Title VII. *Id.* at 3.

On April 13, 1990, Ms. Walters asked to be rehired by MEE. *Id.* MEE agreed, but subsequently discharged her on April 23, 1990, for unsatisfactory job performance upon discovering that she was seeking employment with one of MEE's business competitors. *Id.* Ms. Walters then filed a second charge against MEE with the EEOC, claiming that she was discharged in retaliation for her original gender discrimination charge. *Id.*

Thereafter, in 1993, the EEOC filed a lawsuit in federal District Court against MEE and its President, Leonard Bieber, for violating Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), which prohibits retaliatory discharges. *EEOC Brief* at 4. Ms. Walters intervened in that lawsuit, bringing additional claims under Title VII and under state law. *Id.* Respondents MEE and Bieber moved to dismiss the suit, claiming the District Court lacked subject matter jurisdiction because MEE was not an "employer" for purposes of

Title VII. *Id.* Title VII defines "employer," in relevant part, as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ...." 42 U.S.C. § 2000e(b).

The District Court granted the respondents' motion, and the United States Court of Appeals for the Seventh Circuit affirmed on appeal. *Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225 (7th Cir. 1995). The sole issue in dispute was the meaning of the phrase "fifteen or more employees for each working day in each of twenty or more calendar weeks." The Seventh Circuit followed its own precedent from *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 352 (7th Cir. 1983), a case which construed the similarly worded definition of "employer" from the Age Discrimination in Employment Act (ADEA). *Metropolitan*, 60 F.3d at 1227. In *Zimmerman*, the Seventh Circuit held that, in order to give meaning to the phrase "for each working day," the court would count all salaried employees toward the jurisdictional minimum, but only count hourly or part-time workers as employees on days on which they were physically present or on paid leave. If the jurisdictional minimum were present on each day of a work week, that week could count toward one of the twenty required. *Id.* at 1227. In applying the *Zimmerman* test to MEE, both the District Court and the Court of Appeals found that MEE was not an employer for purposes of Title VII, and therefore the federal court lacked jurisdiction. *Id.* at 1230.

EEOC and Ms. Walters claimed that the *Zimmerman* approach was flawed, and asked the Seventh Circuit to reconsider its interpretation of the statute. *Id.* at 1227. They contended that the court should employ the "payroll method" instead. *Id.* at 1228-29. Under that method, which is

employed by the EEOC under its guideline, *id.* at 1229, a court simply looks to the number of employees maintained on the employer's payroll in a given week. *Id.* at 1227. If the jurisdictional minimum is met for that week, then the week is counted toward one of the twenty calendar weeks. *Id.*

The Seventh Circuit was unpersuaded by the arguments of petitioners. *Id.* at 1230. It rejected the payroll method as ignoring the "plain text" of the phrase "for each working day," *id.* at 1228, and further found the petitioners' legislative history and public policy arguments unavailing in light of the Seventh Circuit's "settled statutory interpretation." *Id.* at 1229-30.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate in its employment practices on the basis of race, color, religion, gender, or national origin. 42 U.S.C. § 2000e, *et seq.* In Section 2000e(b), Congress defined the term employer to mean: "[A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." EEOC, the agency responsible for administering Title VII of the Civil Rights Act of 1964, has interpreted Section 2000e(b) by utilizing the "payroll method." That method simply looks at the number of employees on a payroll for a given week. If at least fifteen employees appear on that payroll, that week is counted toward the jurisdictional minimum. The Seventh Circuit has adopted a different method, designated the *Zimmerman* method. Under *Zimmerman*, the Seventh Circuit first counts all salaried employees toward the minimum. Then, as to all

other employees, it requires that EEOC look at each working day in a given week. If at least a total of fifteen employees are either salaried, at work, or on compensated leave for each working day in a given week, that week may be counted toward the jurisdictional minimum.

Because Section 2000e(b) goes to the jurisdiction of EEOC, this Court should not defer to EEOC's interpretation of that statute. A regulatory agency has no authority to determine the scope of its own jurisdiction; rather, its jurisdiction is determined by Congress' intent. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 616 (1944). Instead, EEOC's interpretation may be entitled to consideration, depending upon the consistency of its application, the validity of its reasoning, and the thoroughness evident in its consideration. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The validity of EEOC's reasoning is flawed. It does not offer an adequate explanation for failing to give import to the statutory language "for each working day." EEOC argues that, in an ongoing employer-employee relationship, an employer "has" an employee every day even if an employee does not work "for each working day," and that therefore that phrase is insignificant. This interpretation is undermined both by the fact that Congress never evidenced any intent to focus on the relationship between employer and employee in its statute, and by the fact that EEOC counts employees toward the jurisdictional minimum even in the absence of any such relationship.

EEOC also failed to consider thoroughly legislative history in arriving at its interpretation. While EEOC points out that a motivating factor behind the statute's modification was the concern of its sponsors respecting seasonal and agricultural employers, that history does not shed light on the

question of what Congress intended by inclusion of the phrase "for each working day." Contrary to EEOC's version, the legislative history relevant to the specific language in dispute, "for each working day," is sparse. The legislative history indicates that Congress intended to expand the exemptions for small businesses, rather than limit them, when it defined the term "employer" by setting a jurisdictional minimum number of employees.

Interpreting the statute according to established principles of statutory construction requires that significance be attributed to the phrase "for each working day." A proper construction requires that EEOC look at each working day and establish that an employer have at least fifteen employees present or compensated on each day of a week in order for that week to count toward the jurisdictional minimum.

Congress clearly intended to exempt small businesses from the reach of Title VII by defining the word "employer" in terms of size. Congress has consistently expressed a policy of giving small businesses the widest degree of freedom in which to manage themselves, without being saddled with the cost of federal regulatory burdens which inhibit their ability to operate or survive.

Any limitation on EEOC's jurisdiction determined by interpretation of this statute is a consequence that comports with congressional policy. Curbing the reach of EEOC will not, as EEOC presumes, necessarily result in a corresponding increase of offensive employment practices, only in the ability of EEOC, a federal agency, to exercise jurisdiction over small businesses. Moreover, the possibility of negative consequences flowing from a rejection of EEOC's interpretation is insufficient to establish EEOC's jurisdiction in the absence of a congressional intent to confer such jurisdiction.

ARGUMENT

I

EEOC'S GUIDELINE IS NOT ENTITLED TO GREAT DEFERENCE

A. This Court Should Construe the Term "Employer" Independent of Agency Interpretation

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate in its employment practices on the basis of race, color, religion, gender, or national origin. 42 U.S.C. § 2000e, *et seq.* In Section 2000e(b), Congress defined the term employer to mean: "[A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."

This Court must determine what Congress intended by its definition of the term "employer." To arrive at that determination, EEOC has argued strenuously that, as the agency officially charged with administering Title VII, this Court should defer to its interpretation of Section 2000e(b).[1]

---

[1] EEOC has promulgated an interpretation of "employer" based upon 42 U.S.C. § 2000e(b). EEOC Policy Guidance N-915-052 (guideline) (cited by reference to Petitioner EEOC's Appendix D at 30a-40a (Pet. App.)). EEOC's guideline provides that all employees who appear on the payroll for a given week are counted, regardless of whether they are present for every working day of that week. Pet. App. at 40a.

However, because the interpretation in question goes directly to the issue of the authority delegated by Congress to EEOC, principles of administrative law demonstrate that EEOC's interpretation is not entitled to deference by this Court. As stated in *Addison*, 322 U.S. at 616, "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

Congress went to considerable lengths in crafting the definition of the term "employer" for purposes of Title VII. It established parameters as to number of employees, days worked, and weeks worked, within the fixed time frame of two calendar years, 42 U.S.C. § 2000e(b); it also included a detailed phase-in period. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 253-54. As pointed out in *Addison*, "[t]he wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language." *Addison*, 322 U.S. at 616. Here, the specificity with which Congress limited the reach of Title VII hardly amounts to a broad delegation of discretion to EEOC to determine who falls within Title VII's proscriptions. EEOC's request for deference to its interpretive guideline amounts to a request that EEOC be allowed to decide for itself the scope of its statutory jurisdiction.

This Court has previously had occasion to consider similar questions of deference to administrative agency determinations of jurisdiction. In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), this Court rejected the Federal Maritime Commission's interpretation of its legislative authority. Said the Court:

> But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. [Citation omitted.] This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that *an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.*

Id. at 745 (emphasis added). This Court has further stated that: "[a]n agency may not finally decide the limit of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946). *See, also, Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) ("[C]ourts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute ... that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). An administrative agency's authority is entirely a product of the legislation which created it. *Nierotko*, 327 U.S. at 369. Because the statute at issue in this case goes directly to the scope of authority delegated to EEOC, it is incumbent upon this Court to determine independently whether EEOC's exercise of jurisdiction over defendant MEE was consistent with the statute enacted by Congress.

B. EEOC's Guideline Is Entitled Only to Consideration

In arriving at a proper interpretation of the term "employer," the measure of deference due EEOC's interpretation is relatively low.[2] This Court has previously addressed EEOC guidelines in *General Electric Company v. Gilbert*, 429 U.S. 125 (1976). In that case, as in this, EEOC argued that its guidelines were entitled to "great deference." *General Electric*, 429 U.S. at 140 (citation omitted). In rejecting EEOC's guideline, the Court refused to defer to the EEOC guidelines:

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[2] Both the court below and the EEOC cited *Chevron* for the principle that deference is due legitimate agency interpretations, *Metropolitan*, 60 F.3d at 1229-30, *EEOC Brief* at 39. However, it is clear from an examination of this Court's precedents that the degree of deference shown by this Court to the Environmental Protection Agency (EPA) regulation addressed in *Chevron* does not apply to EEOC's guideline. *Chevron* dealt with a valid EPA regulation, in which Congress made an "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. 843-44. As stated above and conceded by EEOC, EEOC has no substantive rule-making authority. *EEOC Brief* at 35. In addition, Congress neither explicitly nor implicitly delegated authority to EEOC to interpret the term "employer"; rather, Congress chose to strictly limit EEOC's authority by defining the term itself in very specific language. Unlike in *Chevron*, the respondent is not challenging "the *wisdom* of the agency's policy," a challenge which the Court held must fail, *Chevron*, 467 U.S. at 866 (emphasis added); rather, respondent is challenging the agency's *authority* under the delegation made by Congress.

> [I]t should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. [Citation omitted.] This does not mean that EEOC guidelines are not *entitled to consideration in determining legislative intent* [citation omitted]. But it does mean that courts properly may accord less weight to such guidelines than administrative regulations ....

General Electric, 429 U.S. at 141 (emphasis added). *General Electric* acknowledged that not all administrative agency actions were entitled to identical treatment by the courts; rather, the degree of deference to which agency actions are entitled depends upon the authority that Congress delegates to that agency.

General Electric announced that EEOC guidelines are entitled only to *consideration* under the standards announced in *Skidmore*. *Skidmore* held that agency interpretations "constituted a body of experience and informed judgment to which courts ... may properly resort for *guidance*." *Skidmore*, 323 U.S. at 140 (emphasis added). *Skidmore* listed several elements which would help a court to evaluate the persuasive weight which should be accorded an agency's interpretation: the thoroughness evident in its consideration; the validity of its reasoning; and its consistency with earlier and later pronouncements. *Id*. Any deference owing to EEOC's guideline must be evaluated under the standard announced in *Skidmore*. EEOC's guideline is not entitled to deference as "'a reasonable policy choice for the agency to make.'" *EEOC Brief* at 39 (citing *Chevron*, 467 U.S. at 845).

Under the *Skidmore* standard, EEOC's guideline fails to merit much weight. While it is true that EEOC has

consistently given a very liberal interpretation to the term "employer" in construing its own jurisdiction, as demonstrated by the analysis below, there are flaws in EEOC's reasoning and thoroughness in arriving at its interpretation of Section 2000e(b).

C. The Validity of EEOC's Reasoning

1. EEOC's Attribution to Congress of an Intent to Define "Employer" in Terms of an Employer-Employee Relationship Is Unsubstantiated

The question as to whether EEOC's interpretation is correct depends upon a finding that EEOC's official construction of Section 2000e(b) comports with Congress' intent in creating its very specific definition of the term "employer." EEOC's guideline is quite succinct in explaining Section 2000e(b). It clearly states that "[t]he Commission's position is that all part-time employees are counted whether they work part of each day or part of each week, as long as they are on the payroll." Pet. App. 34a. This is consistent with the EEOC's assumption that appearance on the payroll evidences an ongoing "employer-employee relationship."

The concept that Congress bore any concern whatsoever about an "ongoing employer-employee relationship" is one manufactured out of whole cloth by EEOC. There is no support in the statutory text or the legislative history that Congress intended its definition to cover the employer-employee relationship. As EEOC points out, Senator Dirksen explained that "the 'definition of "employer" [was] amended to provide a *specific test for computing the number of employees of an employer*, in determining whether the employer is covered by the bill.'" *EEOC Brief* at 28 (citing

110 Cong. Rec. 12,818 (1964) (emphasis added)). In other words, Congress opted for a mathematical formula. Had it intended to emphasize the existence of a relationship rather than simply provide a plain number equation, Congress could have done so.

In support of its argument that the nature of the relationship is relevant to the statutory interpretation inquiry, EEOC places great emphasis on the definition of the term "has." EEOC claims that "having" an employee evidences Congress' preoccupation with the notion of an ongoing "employer-employee relationship," and thereby justifies denying the phrase "for each working day" any special meaning because, presumably, an employer "has" an employee even on days on which that employee is not working. As noted above, Congress never expressed that the existence of a relationship was the focus of its concern. But even assuming that it is a relevant inquiry, EEOC's guideline demonstrates that the EEOC will count an individual as an employee whether or not that individual has an ongoing relationship with an employer. The guideline states that a person who "fills in" for an employee taking a day off is counted as an employee for the week in which that person appears on the payroll. Pet. App. 34a n.4. In other words, an individual who works one day, perhaps out of an entire year, will be counted by the EEOC as an employee "for each working day" of the week in which he or she showed up for work.

For EEOC's argument to remain consistent with the concept that the employer-employee relationship must exist "for each working day," EEOC should count an individual only if *that particular individual* has an ongoing employer-employee relationship, a position which EEOC has not adopted in its guideline. Ironically, EEOC indicates that the payroll method interpretation adopted by the First Circuit in

Thurber v. Jack Reilly's, 717 F.2d 633 (1st Cir. 1983), and reaffirmed in *Vera-Lozano v. International Broadcasting*, 50 F.3d 67 (1st Cir. 1995), is correct--but both of those cases indicated that part-time employees were counted under the payroll method only if an individual had "an ongoing employment relationship with the employer during the requisite twenty weeks." *Vera-Lozano*, 50 F.3d at 69. As noted above, EEOC expressly rejects that interpretation by stating that "a person 'filling in' for a regular employee should be counted as an employee during any week that (s)he is actually on the payroll." Pet. App. at 34a n.4. In taking that position, EEOC adopts an interpretation which *Thurber* specifically rejected. In *Thurber*, the First Circuit approved the exclusion of a part-time employee from the jurisdictional count--in the very case which EEOC's guideline rejects--because, in that case, the employee was only "occasional help, hired only to fill in for isolated vacation days of the regular employees." *Thurber*, 171 F.2d at 634. Clearly, the concept of an employment relationship is simply irrelevant to the jurisdictional inquiry.

2. EEOC's Official Interpretation Does Not Attribute any Meaning to the Statute's Phrase "for Each Working Day"

EEOC's guideline interpretation entirely ignores the phrase "for each working day." While EEOC has crafted several arguments as to how it gives meaning to that phrase, none bear up under scrutiny.

One argument for explaining how EEOC's interpretation gives meaning to the phrase "for each working day" is that, "'[b]ecause workers might join or leave a firm midweek, the clause ... meaningfully modif[ies] the language that follows: "in each of twenty or more calendar weeks."'" *EEOC Brief* at 22 (citation omitted). The problems with this argument

are manifold. First, as the Seventh Circuit pointed out in its decision below, the occasions on which an employee begins or ends employment midweek "are unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." *Metropolitan*, 60 F.3d at 1228. EEOC offers no explanation as to how excluding such weeks from the jurisdictional count serves any purpose related to Title VII or its jurisdictional exemption provision. Second, the argument does not stand up well under a textual analysis: the phrase "for each working day" adds little to the subsequent phrase to demonstrate that midweek starts and terminations are implicated by that phrase. Third, and most significantly, EEOC's guideline counts "all regular part-time employees ... whether they work part of each day or part of each week," Pet. App. at 40a, indicating that, because the guideline expressly states that it looks only at the payroll *week*, employees are counted by EEOC *regardless of when they began or ended employment*. Consequently, the argument put forth by EEOC regarding new and terminated employees is not only nowhere evidenced in its guideline, the guideline plainly *rejects* rather than supports EEOC's newly minted argument.

The greatest inconsistency in EEOC's position is its claim that it "counts the number of salaried and hourly paid employees on the employer's payroll for that *day*," *EEOC Brief* at 14, in order to support its claim that it has in fact given significance to the phrase "for each working day." Nowhere does the EEOC guideline indicate that it looks at payroll *days* at all. On the contrary, it cites with favor the First Circuit's decision in *Thurber* and other cases that "the proper standard in determining whether an employer has the requisite number of employees is to count the number of employees maintained on the payroll in a given *week*." Pet. App. at 32a (emphasis added). EEOC further justifies its avoidance of the phrase "for each working day" by resort

to the statutory construction principle that the "literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislation." *Id.* at 36a (citation omitted). Given that the thrust of EEOC's guideline is to explain why EEOC is entitled to ignore the phrase "for each working day" in the statute, it is ironic that EEOC has offered a contrary position in this case by proposing new and novel explanations of how it has in fact *not* ignored the phrase "for each working day" in its guideline.

The inconsistencies between the justifications offered in EEOC's guideline for ignoring the phrase "for each working day" as compared to the justifications offered in its present argument amply illustrate flaws in EEOC's reasoning. EEOC has simultaneously taken the position that the phrase "for each working day" is a superfluity, *EEOC Brief* at 23 n.15, and that its official interpretation amply accounts for that phrase. *EEOC Brief* at 22. Because EEOC's explanation of its own interpretation of the statute is not supported by valid reasoning, under the *Skidmore* standard, EEOC's interpretation should not be given significant persuasive weight.

D. EEOC Has Not Thoroughly Considered Legislative Intent in Reaching Its Interpretation

Contrary to EEOC's claims, the legislative history of Section 2000e(b) cited by EEOC supports the interpretation that Congress intended to *exclude* from Title VII coverage employers who had less than fifteen employees at work or compensated on each working day in a given week.

The original bill which became the Civil Rights Act of 1964 defined "employer" as "a person engaged in an industry affecting commerce who has twenty-five or more employees,

and any agent of such a person." *EEOC Brief* at 23-24 (citation omitted). This bill was criticized by various Congressmen because it "would permit government to object to hiring practices by a store that 'employed as many as 25 persons full or part time." *Id.* at 24 (citation omitted). In its original form, the statute was understood by members of the legislature to include part-time employees.

The relevant portion of the "employer" definition was subsequently modified in two ways. Congress added the phrase "for each working day" *and* the phrase "in each of twenty or more calendar weeks in the current or preceding calendar year." One basis for the modification was that the sponsors of the bill were motivated by their concern for employers of seasonal and agricultural workers. *Id.* at 26 (citation omitted). The sponsors believed that the actual size of such businesses did not justify applying Title VII to them, despite the fact that they hired significant numbers of employees for a short period of time during the year. *Id.* at 27-28 (citations omitted).

EEOC argues that, because a concern for seasonal workers prompted modification, the language of the statute should be interpreted consistent with insuring that employers of seasonal workers be exempted, but no more. However, that argument has two failings: first, the legislative history relevant to seasonal employers is not specifically relevant to the question of nonseasonal employers; and second, the concern about employers of seasonal workers would have been adequately resolved by the simple insertion of the phrase "in each of twenty or more calendar weeks in the current or preceding calendar year." It did not require the addition of the phrase "for each working day."

In short, there is nothing in the legislative history of Title VII to demonstrate that application of the phrase "for

each working day" was limited only to the context of seasonal or agricultural employers. Indeed, "the legislative history of Title VII is too confused and chaotic to be of much use," *Metropolitan*, 60 F.3d at 1227 n.3., in construing Congress' intent with respect to the treatment of nonfull-time employees. The only legislative history that may be relevant to such employees specifically are *criticisms* which were leveled at the original definition *because it included part-time employees* in the jurisdictional count. *EEOC Brief* at 24 (citations omitted). It is reasonable to conclude from the legislative history that the modification of adding the phrase "for each working day" was intended to redress those criticisms, and that the modification of adding the "twenty or more calendar weeks" language was intended to redress the concerns as to seasonal employers.

In sum, the legislative history of Section 2000e(b) offers little support for EEOC's interpretation of "employer" as counting employees toward the jurisdictional minimum who do not work on "each working day."[3] Rather than providing

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[3] EEOC also argues that Senator Dirksen, a sponsor of the legislation, derived the statutory language from the Unemployment Compensation Act (UCA). *EEOC Brief* at 28-29 (citation omitted). EEOC reasons that, because the "payroll method" is consistent with the interpretation of the language used in the UCA, and because Section 2000e(b) was modeled on the UCA, Section 2000e(b) should be construed to receive the same "payroll method" interpretation. However, the UCA, now part of the Internal Revenue Code, at that time defined employer, in relevant part, as a person who, "on each of some 20 days during the calendar year, each day being in a different calendar week, employed at least [4] individuals in employment for some portion of the day." 26 U.S.C. § 3306 (modified in 1970 (continued...)

a well-reasoned analysis of *Congress'* intent in construing "employer" for the purpose of Title VII, EEOC's guideline instead offers only a justification for its own construction of that term. Because EEOC's guideline interpretation is flawed in the thoroughness evident in its consideration, this Court should give little persuasive weight to EEOC's guideline in construing the meaning of Section 2000e(b).

II

THE PROPER INTERPRETATION OF "EMPLOYER" UNDER TITLE VII

A. Rules of Statutory Construction Support a "Plain Language" Interpretation

> [T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). The Seventh Circuit concluded that its interpretation comports with the "plain language" of Section 2000e(b), in that it gives meaning to the phrase "for each working day" which is lacking in EEOC's

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[3] (...continued)
Amendment to reduce number of employees from 4 to 1). As is clearly evident, the language utilized in the UCA definition is widely divergent from that used in Title VII, demonstrating that, had Congress intended the EEOC to count all employees even if they showed up only once a week (clearly required in the UCA definition), Congress not only knew how to say so, it had considered the model and rejected it.

interpretation. *Metropolitan*, 60 F.3d at 1228. EEOC argues that no import should be assigned to the phrase "for each working day," or, alternatively, that the phrase presents an ambiguity which EEOC's interpretation amply clarifies. *EEOC Brief* at 22. As pointed out above, EEOC's guideline simply fails to assign any meaning to the phrase "for each working day," since its official interpretation would have no different meaning than that if the phrase were omitted. Indeed, EEOC explains that, despite the addition of the phrase "for each working day," the interpretation of the statute should have the *same meaning* as the similar provisions utilized during the phase-in periods when that phrase *was absent*. *EEOC Brief* at 23 n.15. This argument ignores the settled rule that "'[w]here Congress includes particular language in one section of a statute but omits it in another ... it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Keene Corp. v. United States*, 508 U.S.___, 113 S. Ct. 2035, 2040 (1993) (citation omitted).

The significance of disparate language is amply pointed out in *Young-Gerhard v. Sprinkle Masonry, Inc.*, 856 F. Supp. 300 (E.D. Va. 1994). In that case, an employer subject to Title VII disputed the measure of damages based on 42 U.S.C. § 1981a(b)(3). Section 1981a(b)(3) limits the sum of compensatory and punitive damages in the following fashion: "(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000." The employer, Sprinkle, argued that the *Zimmerman* interpretation should be utilized by the court in measuring damages. *Young-Gerhard*, 856 F. Supp. at 301-02. However, the court rejected the employer's argument that the jurisdiction and the punitive statutes should be interpreted alike. *Id.* at 302. Placing the two statutes side by side in a

comparison, the court pointed out the disparity marked by the absence of the phrase "for each working day" in Section 1981a. *Id.* at 301. Upon finding the *Zimmerman* interpretation of the jurisdictional statute was better than that put forward in *Thurber*, the court concluded that

> [t]his reflection, however, should give Sprinkle no comfort, because the words of Sec. 1981a(b)(3)(B) appear simple enough ....
>
> Congress did not include in Sec. 1981a, as it did in Sec. 2000e, the phrase "for each working day." The Court concludes that the difference expresses the Congressional intent that the number of employees working each day is not a factor in applying the damage limitations under Sec. 1981a.

Young-Gerhard, 856 F. Supp. at 302. Consequently, the court utilized the *payroll method* to count the number of employees for Section 1981a purposes--*in a statute which omitted the phrase "for each working day."*

It is a settled rule of statutory construction that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." J. Sutherland, *Statutory Construction*, § 46.06 (1992). *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). By arguing that Congress' language should be given an identical interpretation in two statutes, where in one Congress includes the phrase "for each working day" and in the other Congress uses identical language but for the omission of that phrase, *EEOC Brief* at 23 n.15, EEOC essentially argues that Congress either made a mistake by its inclusion, or simply did not mean anything by its inclusion. While courts are not barred from disregarding words in a statute, courts do so only where it is clear that literal

"application will result in applying the statute as a whole in a way completely contradictory to its main and paramount purpose." J. Sutherland, *Statutory Construction*, § 47.37 (citation omitted). This is not such a case. The phrase "for each working day" *must* be construed in such a way as to give it significance in the context of the statute.

B. "Each Working Day" Should Refer to Compensation or to Physical Presence

In construing Section 2000e(b), some import must be assigned to the phrase "for each working day" in order to comply with the statutory canon that courts must give effect to all of the words of a statute.

In that respect, the Seventh Circuit's opinion adheres to established principles of statutory construction. Although it makes a distinction between hourly and salaried employees that is not clear on the face of the statute, the distinction is reasonable: under a counting method which looks to each working day, part-time employees are bound to receive different treatment than full-time employees. In essence, the Seventh Circuit's interpretation places emphasis on how many employees are being compensated on each working day.

An alternate interpretation which also adheres to a "plain meaning" interpretation and which would abolish the status distinctions disfavored by EEOC would simply count the number of employees present on a given work day. It would simply require that, for each working day in a given week, at least fifteen employees must be present at work in order for that week to count toward the jurisdictional minimum. This interpretation would simplify the administration of the statute for both EEOC and employers by clarifying, conclusively, when an employer is covered by Title VII.

Both the *Zimmerman* approach and the "physical presence" approach are consistent with established principles of statutory construction.

III

CONGRESSIONAL POLICY FAVORS A BROAD EXEMPTION FOR SMALL BUSINESSES

The purpose behind the specific statute in question, the "employer" definition, is to provide an exemption. EEOC wishes to construe the exemption as narrowly as possible, despite the fact that the entire legislative history of the statute demonstrates that Congress modified the original language out of a concern that EEOC's jurisdictional coverage would reach *too far*. Congress defined "employer" specifically to limit Title VII coverage to businesses of a certain size. *EEOC Brief* at 31 n.22 (citation omitted).

When viewed in context, the broader policy implications of Congress' concerns about seasonal employers clearly militate in favor of an interpretation in which the jurisdictional element requires fifteen employees to be at work or compensated on every working day of a work week in order for that week to count toward the minimum. Senator Dirksen and other senators were critical of Section 2000e(b) and sought modification out of a belief that the original definition of "employer" was *too inclusive*, and that certain small businesses *should be exempt* from Title VII. *Id.* at 28 (citation omitted). As Senator Humphrey explained, the rationale behind the number limitation was that "when the number of an employer's employees gets 'above 25, they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services. They also lose most of whatever intimate, personal character they might have had.'" *Id.* at 31 n.22 (citation omitted).

Congress clearly intended that the calculation of the number of employees was meant to reflect the more general concept of the size of a business.

While the number of employees is clearly the relevant inquiry for purposes of defining jurisdiction under Section 2000e(b), Senator Humphrey's remarks indicated that gross product and the inherently personal nature of business relationships within small organizations prompted the size limitation. In other words, the intent behind the exemption provision, as expressed by Congress' modification of the statutory language, had significance beyond the mere attempt to exclude agricultural and seasonal employers. It reflected a more general intent to exclude all small employers from federal interference in the conduct of their business affairs. Consequently, the question of whether an interpretation of the statute comports with the policy goals of the statute must be determined by looking at why Congress would adopt an overall policy of providing a small business exemption to Title VII coverage.

Congress has often created exceptions and exemptions for small businesses, as well as creating special preferences for small businesses. *See, for example*, 15 U.S.C. § 2508 (one of many small business contracting set asides, this one for electric vehicle research and development); 21 U.S.C. § 343 (small business exemption from requirements under federal Food, Drug and Cosmetic Act); 22 U.S.C. § 2352 (creation of Office of Small Business to assist small businesses in participating in foreign commerce); 26 U.S.C. § 44 (special income tax credit available to eligible small businesses for the creation of disabled access); 38 U.S.C. § 3742 (creation of program for veterans to receive small business loans). These various federal programs clearly demonstrate that it is entirely consistent with federal policy to make special accommodations for small businesses. In

enacting the Small Business Act, 15 U.S.C. § 631, *et seq.*, Congress expressed the policy for such accommodations thus:

> For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary, consistent with its needs and obligations and other essential considerations of national policy, *to implement and coordinate all Federal department, agency and instrumentality policies, programs, and activities in order to: foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small business.*

15 U.S.C. § 631a(a) (emphasis added).

One way in which small business interests can be fostered is by exempting them from certain federal regulations. Such exemptions are not based on the idea that small businesses ought not conduct themselves consistent with federal policies, such as discouraging discrimination. Rather, Congress appears to be conscious of the fact that the cost of compliance with federal regulations can stifle the ability of small enterprises to allocate their limited resources to items which will add value to a business rather than simply increase the overhead of being in business. Special

treatment for small businesses reflects the congressional policy choice that foregoing an increase in a federal bureaucracy's jurisdiction is worth "the economic well-being [and] security of this Nation." 15 U.S.C. § 631(a). Freeing small businesses from some of the regulatory burdens at the early stages of their growth allows breathing space for such companies to become financially stable before expansion. Once these enterprises expand, they will soon enough be subject to Title VII and other federal laws, but they will be better able to cope with such regulatory burdens after they have reached a certain minimum size.

There is no doubt that the "employer" definition was intended to reflect a balancing of considerations: Congress' interest in exempting small businesses from too high a regulatory burden, and its countervailing interest in eliminating workplace discrimination. It is this Court's job to construe exactly where Congress struck that balance in enacting Section 2000e(b). In order to insure that small business enterprises receive equitable treatment under Title VII, and thus fulfill Congress' intent in *exempting* small businesses from too much federal regulation of their employment policies, amici support a plain meaning interpretation of employer. Section 2000e(b) requires that fifteen or more employees attend work or be compensated for each working day of a week in order for that week to count toward the jurisdictional minimum, and it is only employers who qualify under this calculation who are subject to Title VII and the jurisdiction of EEOC.

CONCLUSION

In carefully fashioning a definition of employer in Title VII of the Civil Rights Act of 1964, Congress intended to free small businesses from the reach of the federal statute, and indicated an understanding that interference by the government in the affairs of small businesses was unjustified. Both the language and legislative history of the statute in question bear out this intent by excluding employers such as respondents from the statute's reach. While EEOC's intent in trying to promote the protections of Title VII may be admirable, its interpretation should nevertheless be rejected as an unjustified attempt to expand its own jurisdiction beyond the grant of power conferred upon that agency by Congress.

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